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HUB LAW OFFICES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHURCH OF SCIENTOLOGY INTERNATIONAL, a California not-for-profit religious corporation, Plaintiff, vs. GERALD ARMSTRONG and DOES 1 through 25, inclusive, Defendants.	Case No. BC 052395 PLAINTIFF'S NOTICE OF FILING OF FEDERAL AND NON-CALIFORNIA CASES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED COMPLAINT DATE: July 2, 1992 TIME: 8:30 a.m. DEPT: 30 DISCOVERY CUTOFF: None MOTION CUTOFF: None TRIAL DATE: None

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiff, Church of Scientology International, herewith submits the following Federal and non-California cases cited in Plaintiff's Opposition to Defendant's Demurrer to Plaintiff's First Amended Complaint which was filed with this court on June 25, 1992. (No non-California cases were cited in Plaintiff's Opposition to Defendant's Motion to Strike.)

///

1. D.H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124
2. Hoffman v. United Telecommunications. Inc. (D.Kan. 1988) 687 F.Supp. 1512
3. McLean v. Church of Scientology of California (11th Cir. 1991)
4. Pic'l. Precision Instrument Manufacturing Co. v. Automotive Maintenance (1945) 324 U.S. 806
5. Trump v. Trump (1992) ___ N.Y. 2d. ___
6. Vicki Aznaran, et al. v. Church of Scientology of California, et al. U.S.D.C. Central District of California, No. CV 88-1786 (Ex)
7. Wakefield v. Church of Scientology of California (11th Cir. 1991) 938 F.2d 1226

DATE: June 29, 1992

Respectfully submitted,

BOWLES & MOXON

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Andrew H. Wilson
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CHURCH OF SCIENTOLOGY
INTERNATIONAL

Federal Government or a State confesses that a conviction has been erroneously obtained."

⊥206 That is the practice in civil cases also. Cates v. Haderlein, 342 U.S. 804, 72 S.Ct. 47, 96 L.Ed. 609.

Moreover, once a case is properly here, our disposition does not necessarily follow the recommendations or concessions of the parties. Utah Public Service Comm'n v. El Paso Natural Gas Co., 395 U.S. 464, 468–469, 89 S.Ct. 1860, 1862, 23 L.Ed.2d 474. In that case, the appellant changed its view of the merits after the case reached us and, like the appellee, thought the appeal should be dismissed. An *amicus,* however, presented contrary views. We concluded that the decree of the District Court, after our prior remand, did not comply with our order. Consensus of the parties does not, in other words, control our decisionmaking process.[3]

The Court, to be sure, approves that part of the District Court's opinion which holds that the Pennsylvania confession-of-judgment scheme cannot constitutionally be applied to the class of Pennsylvania residents who earn less than $10,000 annually and who enter into nonmortgage credit transactions, unless prior to judgment it is shown that they voluntarily and knowingly executed such instruments purporting to waive trial and appeal. On the other hand, the Court now affirms without discussion the refusals of the District Court (1) to extend similar class relief to confessed debtors who either enter into mortgage transactions or who earn more than $10,000 yearly, and (2) to declare the statutes facially unconstitutional. 314 F. Supp. 1091, 1102–1103, 1112 (1970).

⊥207 It is anomalous that an appellee by confessing error can defeat an appeal. In the instant case we have not been handicapped by the appellees' refusal to oppose the judgment below. Finance companies intervened in the District Court. We have been fully informed by them and by *amici* of the many facets of this controversy. We should therefore discuss the merits and reach all issues tendered.

405 U.S. 174, 31 L.Ed.2d 124

D. H. OVERMYER CO., INC., OF OHIO, et al., Petitioners,

v.

FRICK COMPANY.

No. 69–5.

Argued Nov. 9, 1971.

Decided Feb. 24, 1972.

After notice of the entry of judgment on a cognovit note, the maker filed in Ohio court of common pleas motions to stay execution and for new trial, and later a motion to vacate judgment. The maker also tendered answer and counterclaim. The motions were overruled and the Court of Appeals, Lucas County, affirmed. The Supreme Court of Ohio dismissed the appeal for want of any substantial constitutional question, and certiorari was granted. The Supreme Court, Mr. Justice Blackmun, held that where case did not involve unequal bargaining power or overreaching, and the parties' agreement from the start was not a contract of adhesion, and the maker's execution and delivery of a second note, which contained a cognovit provision which the first note had not contained, were for adequate consideration

3. Cf. County of Alameda v. Carleson (California Welfare Rights Organization v. Superior Court of Alameda County), 5 Cal.3d 730, 97 Cal.Rptr. 385, 488 P.2d 953 (1971), where a state official against whom an adverse judgment had been obtained took no appeal; but the judgment was challenged in California by an "aggrieved" organization which had been denied intervention in the lower court and which appealed both from the denial of intervention and from the judgment on the merits. The California Supreme Court reversed on the merits.

and were the product of negotiations carried on by corporate parties with the advice of competent counsel, and the maker despite the cognovit was not defenseless under state law, the maker voluntarily, intelligently and knowingly waived due process rights it otherwise possessed to prejudgment notice and hearing, and did so with full awareness of legal consequences.

Affirmed.

Mr. Justice Douglas filed a concurring opinion in which Mr. Justice Marshall concurred.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision.

1. Bills and Notes ⚷139(3)

Where, in exchange for confession-of-judgment provision and for execution of second mortgages, debtor received benefit and consideration in form of (a) creditor's release of mechanic's liens, (b) reduction in amount of monthly payment, (c) further time in which total amount was to be paid, and (d) reduction of half point in interest rate, debtor's execution and delivery of second note were for adequate consideration. R.C. Ohio §§ 2323.13, 2323.13(C).

2. Constitutional Law ⚷43(1)

Due process rights to notice and hearing prior to civil judgment are subject to waiver. R.C.Ohio §§ 2323.13, 2323.13(C); U.S.C.A.Const. Amend. 14.

3. Constitutional Law ⚷43(1)

That maker of note might not have been able to predict with accuracy just how or when payee would proceed under confession clause if further default by maker occurred did not in itself militate against effective waiver of due process rights to notice and hearing prior to civil judgment. R.C.Ohio §§ 2323.13, 2323.13(C); U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⚷43(1)

Where case did not involve unequal bargaining power or overreaching, and the agreement from the start was not contract of adhesion, and maker's execution and delivery of second note, which contained cognovit provision which first note had not contained, were for adequate consideration and were product of negotiations carried on by corporate parties with advice of competent counsel, and maker, despite cognovit, was not defenseless under state law, maker voluntarily intelligently and knowingly waived due process rights it otherwise possessed to prejudgment notice and hearing, and did so with full awareness of legal consequences. R.C.Ohio §§ 2323.13, 2323.13 (C); U.S.C.A.Const. Amend. 14.

5. Judgment ⚷54

Depending upon facts of particular case, cognovit provision may serve proper and useful purpose in commercial world and at same time not be vulnerable to constitutional attack. R.C.Ohio §§ 2323.13, 2323.13(C); U.S.C.A.Const. Amend. 14.

Syllabus *

After a corporation (Overmyer) had defaulted in its payments for equipment manufactured and being installed by respondent company (Frick), and Overmyer under a post-contract arrangement had made a partial cash payment and issued an installment note for the balance, Frick completed the work, which Overmyer accepted as satisfactory. Thereafter Overmyer again asked for relief and, with counsel for both corporations participating in the negotiations, the first note was replaced with a second, which contained a "cognovit" provision in conformity with Ohio law at that time whereby Overmyer consented in advance, should it default in interest or principal payments, to Frick's obtaining a judgment without notice or hearing, and issued certain second mortgages in Frick's

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

favor, Frick agreeing to release three mechanic's liens, to reduce the monthly payment amounts and interest rate, and to extend the time for final payment. When Overmyer, claiming a contract breach, stopped making payments on the new note, Frick, under the cognovit provision, through an attorney unknown to but on behalf of Overmyer, and without personal service on or prior notice to Overmyer, caused judgment to be entered on the note. Overmyer's motion to vacate the judgment was overruled after a post-judgment hearing, and the judgment court's decision was affirmed on appeal against Overmyer's contention that the cognovit procedure violated due process requirements. *Held:* Overmyer, for consideration and with full awareness of the legal consequences, waived its rights to prejudgment notice and hearing, and on the facts of this case, which involved contractual arrangements between two corporations acting with advice of counsel, the procedure under the cognovit clause (which is not unconstitutional *per se*) did not violate Overmyer's Fourteenth Amendment rights. Pp. 780–783.

Affirmed.

⊥175 Russell Morton Brown, Washington, D. C., for petitioners.

Gregory M. Harvey, Philadelphia, Pa., for respondent.

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue of the constitutionality, under the Due Process Clause of the Fourteenth Amendment, of the cognovit note authorized by Ohio Rev.Code § 2323.13.[1]

⊥176 The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.[2] It was known at least as far

1. When the judgment challenged here was entered in 1968 the statute read:

"Sec. 2323.13. (A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.

"(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

Senate Bill No. 85, 133 Ohio Laws 196–198 (1969–1970), effective Sept. 16, 1970, amended paragraphs (A) and (C), in ways not pertinent here, and added paragraph (D):

"(D) A warrant of attorney to confess judgment contained in any promissory note, bond, security agreement, lease, contract, or other evidence of indebtedness executed on or after January 1, 1971, is invalid and the courts are without authority to render a judgment based upon such a warrant unless there appears on the instrument evidencing the indebtedness, directly above or below the signature of each maker, or other person authorizing the confession, in such type size or distinctive marking that it appears more clearly and conspicuously than anything else on the document:

"'Warning—By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you or your employer regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.'"

2. The Iowa Supreme Court succinctly has defined a cognovit as "the written authority of the debtor and his direction . . . to enter judgment against him as stated

back as Blackstone's time. 3 W. Blackstone, Commentaries *397.[3] In a case applying Ohio law, it was ⊥177 said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." Hadden v. Rumsey Products, Inc., 196 F.2d 92, 96 (CA2 1952). And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." Alderman v. Diament, 7 N.J. L. 197, 198 (1824). Mr. Dickens noted it with obvious disfavor. Pickwick Papers, c. 47. The cognovit has been the subject of comment, much of it critical.[4]

Statutory treatment varies widely. Some States specifically authorize the cognovit.[5] Others disallow it.[6] ⊥178 Some go so far as to make its employment a misdemeanor.[7] The majority, however, regulate its use and many prohibit the device in small loans and consumer sales.[8]

In Ohio the cognovit has long been recognized by both statute and court decision. 1 Chase's Statutes, c. 243, § 34 (1810); Osborn v. Hawley, 19 Ohio 130 (1850); Marsden v. Soper, 11 Ohio St. 503 (1860); Watson v. Paine, 25 Ohio

therein." Blott v. Blott, 227 Iowa 1108, 1111–1112, 290 N.W. 74, 76 (1940).

In Jones v. John Hancock Mutual Life Insurance Co., 289 F.Supp. 930, 935 (WD Mich.1968), aff'd, 416 F.2d 829 (CA6 1969), Judge Fox, in applying Ohio law, pertinently observed:

"A cognovit note is not an ordinary note. It is indeed an extraordinary note which authorizes an attorney to confess judgment against the person or persons signing it. It is written authority of a debtor and a direction by him for the entry of a judgment against him if the obligation set forth in the note is not paid when due. Such a judgment may be taken by any person or any company holding the note, and it cuts off every defense which the maker of the note may otherwise have. It likewise cuts off all rights of appeal from any judgment taken on it."

3. Historical references appear in General Contract Purchase Corp. v. Max Keil Real Estate Co., 35 Del. 531, 532–533, 170 A. 797, 798 (1933), and First Nat. Bk. v. White, 220 Mo. 717, 728–732, 120 S.W. 36, 39–40 (1909).

4. Recent Cases, Confession of Judgments—Refusal of New York State to Enforce Pennsylvania Cognovit Judgments, 74 Dick.L.Rev. 750 (1970); Note, Enforcement of Sister State's Cognovit Judgments, 16 Wayne L.Rev. 1181 (1970); H. Goodrich, Conflict of Laws § 73, p. 122 (4th ed. 1964); Hopson, Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit, 29 U.Chi. L.Rev. 111 (1961); Hunter, The Warrant of Attorney to Confess Judgment, 8 Ohio St.L.J. 1 (1941); Note, A Clash in Ohio?: Cognovit Notes and the Business Ethic of the UCC, 35 U.Cin.L.Rev. 470 (1966); Comment, The Effect of Full Faith and Credit on Cognovit Judgments, 42 U.Colo.L.Rev. 173 (1970); Comment, Confessions of Judgment: The Due Process Defects, 43 Temp.L.Q. 279 (1970); Comment, Cognovit Judgments and the Full Faith and Credit Clause, 50 B.U.L.Rev. 330 (1970); Comment, Cognovit Judgments: Some Constitutional Considerations, 70 Col.L.Rev. 1118 (1970); Note, Confessions of Judgment, 102 U.Pa.L.Rev. 524 (1954); Note, Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney, 56 Va.L. Rev. 554 (1970); Note, Should a Cognovit Judgment Validly Entered in One State be Recognized by a Sister State?, 30 Md.L.Rev. 350 (1970).

5. Ill.Rev.Stat., c. 110, § 50; Mo.Rev.Stat. § 511.100; Ohio Rev.Code § 2323.13; Pa. Stat.Ann., Tit. 12, §§ 738 and 739 and Pa. Rules of Civil Procedure 2950–2976, 12 P.S. Appendix; S.D.Comp.Laws § 21–26–1.

6. See, for example, Ala.Code, Tit. 20, § 16, and Tit. 62, § 248; Ariz.Rev.Stat.Ann. §§ 6–629 and 44–143; Mass.Gen.Laws Ann., c. 231, § 13A.

7. Ind.Ann.Stat. §§ 2–2904 and 2–2906, IC 1971, 34–2–25–1, 34–2–26–1; N.M.Stat. Ann. §§ 21–9–16 and 21–9–18; R.I.Gen. Laws Ann. §§ 19–25–24 and 19–25–36.

8. See, for example, Conn.Gen.Stat.Rev. §§ 42–88 and 36–236; Mich.Comp.Laws §§ 600.2906 and 493.12, Mich.Stat.Ann. §§ 27A.2906 and 23.667(12); Minn.Stat. §§ 548.22, 168.71, and 56.12; N.J.Stat.Ann. § 2A:16–9.

St. 340 (1874); Clements v. Hull, 35 Ohio St. 141 (1878). The State's courts, however, give the instrument a strict and limited construction. See Peoples Banking Co. v. Brumfield Hay & Grain Co., 172 Ohio St. 545, 548, 179 N.E.2d 53, 55 (1961).

This Court apparently has decided only two cases concerning cognovit notes, and both have come here in a full faith and credit context. National Exchange Bank v. Wiley, 195 U.S. 257, 25 S.Ct. 70, 49 L.Ed. 184 (1904); Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U.S. 287, 11 S.Ct. 92, 34 L.Ed. 670 (1890). See American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932).

I

The argument that a provision of this kind is offensive to current notions of Fourteenth Amendment due process is, at first glance, an appealing one. However, here, as in nearly every case, facts are important. We state them chronologically:

1. Petitioners D. H. Overmyer Co., Inc., of Ohio, and D. H. Overmyer Co., Inc., of Kentucky, are segments of a warehousing enterprise that counsel at one point in the litigation described as having built "in three years . . . 180 warehouses in thirty states." The corporate structure is complex. Because the identity and individuality of the respective corporate entities are not relevant here, we refer to the enterprise in the aggregate as "Overmyer."

2. In 1966 a corporation, which then was or at a later date became an Overmyer affiliate, executed a contract with the respondent Frick Co. for the manufacture and installation by Frick, at a cost of $223,000, of an automatic refrigeration system in a warehouse under construction in Toledo, Ohio.

3. Overmyer fell behind in the progress payments due from it under the contract. By the end of September 1966 approximately $120,000 was overdue. Because of this delinquency, Frick stopped its work on October 10. Frick indicated to Overmyer, however, by letter on that date, its willingness to accept an offer from Overmyer to pay $35,000 in cash "provided the balance can be evidenced by interest-bearing judgment notes."

4. On November 3 Frick filed three mechanic's leins against the Toledo property for a total of $194,031, the amount of the contract price allegedly unpaid at that time.

5. The parties continued to negotiate. In January 1967 Frick, in accommodation, agreed to complete the work upon an immediate cash payment of 10% ($19,403.10) and payment of the balance of $174,627.90 in 12 equal monthly installments with 6½% interest per annum. On February 17 Overmyer made the 10% payment and executed an installment note calling for 12 monthly payments of $15,498.23 each beginning March 1, 1967. This note contained no confession-of-judgment provision. It recited that it did not operate as a waiver of the mechanic's liens, but it also stated that Frick would forgo enforcement of those lien rights so long as there was no default under the note.

6. Frick resumed its work, completed it, and sent Overmyer a notice of completion. On March 17 Overmyer's vice president acknowledged in writing that the system had been "completed in a satisfactory manner" and that it was "accepted as per the contract conditions."

7. Subsequently, Overmyer requested additional time to make the installment payments. It also asked that Frick release the mechanic's liens against the Toledo property. Negotiations between the parties at that time finally resulted in an agreement in June 1967 that (a) Overmyer would execute a new note for the then-outstanding balance of $130,997 and calling for payment of that amount in 21 equal monthly installments of $6,891.85 each, beginning June 1, 1967, and ending in February 1969, two years after Frick's completion of the work (as contrasted with the $15,498.23 monthly installments ending February 1968 specified by the

first note); (b) the interest rate would be 6% rather than 6½%; (c) Frick would release the three mechanic's liens; (d) Overmyer would execute second mortgages, with Frick as mortgagee, on property in Tampa and Louisville; and (e) Overmyer's new note would contain a confession-of-judgment clause. The new note, signed in Ohio by the two petitioners here, was delivered to Frick some months later by letter dated October 2, 1967, accompanied by five checks for the June through October payments. This letter was from Overmyer's general counsel to Frick's counsel. The second mortgages were executed and recorded, and the mechanic's liens were released. The note contained the following judgment clause:

> "The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against the under- ⊥181 signed in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for the period of fifteen (15) days."

8. On June 1, 1968, Overmyer ceased making the monthly payments under the new note and, asserting a breach by Frick of the original contract, proceeded to institute a diversity action against Frick in the United States District Court for the Southern District of New York. Overmyer sought damages in excess of $170,000 and a stay of all proceedings by Frick under the note. On July 5 Judge Frankel vacated an *ex parte* stay he had theretofore granted. On August 7 Judge Mansfield denied Overmyer's motion for reinstatement of the stay. He concluded, "Plaintiff has failed to show any likelihood that it will prevail upon the merits. On the contrary, extensive documentary evidence furnished by defendant indicates that the plaintiff's action lacks merit."

9. On July 12, without prior notice to Overmyer, Frick caused judgment to be entered against Overmyer (specifically against the two petitioners here) in the Common Pleas Court of Lucas County, Ohio. The judgment amount was the balance then remaining on the note, namely, $62,370, plus interest from May 1, 1968, and costs. This judgment was effected through the appearance of an Ohio attorney on behalf of the defendants (petitioners here) in that Ohio action. His appearance was "by virtue of the warrant of attorney" in the second note. The lawyer waived the issuance and service of process and confessed the judgment. This attorney was not known to Overmyer, had not been retained by Overmyer, and had not communicated with the petitioners prior to the entry of the judgment.

⊥182 10. As required by Ohio Rev.Code § 2323.13(C), the clerk of the state court, on July 16, mailed notices of the entry of the judgment on the cognovit note to Overmyer at addresses in New York, Ohio, and Kentucky.

11. On July 22 Overmyer, by counsel, filed in the Ohio court motions to stay execution and for a new trial. The latter motion referred to "[i]rregularity in the proceedings of the prevailing party and of the court . . . ." On August 6, Overmyer filed a motion to vacate judgment and tendered an answer and counterclaim alleging breach of contract by Frick, and damages. A hearing was held. Both sides submitted affidavits. Those submitted by Overmyer asserted lack of notice before judgment and alleged a breach of contract by Frick. A copy of Judge Mansfield's findings, conclusions, and opinion was placed in the record. On November 16 the court overruled each motion.

12. Overmyer appealed to the Court of Appeals for Lucas County, Ohio, specifically asserting deprivation of due process violative of the Ohio and Federal Constitutions. That court affirmed with a brief journal entry.

13. The Supreme Court of Ohio, "sua sponte dismisse[d] the appeal for the reason that no substantial constitutional question exists herein."

We granted certiorari. 401 U.S. 992, 91 S.Ct. 1220, 28 L.Ed.2d 530 (1971).

II

This chronology clearly reveals that Overmyer's situation, of which it now complains, is one brought about largely by its own misfortune and failure or inability to pay. The initial agreement between Overmyer and Frick was a routine construction subcontract. Frick agreed to do the work and Overmyer agreed to pay a designated amount for that work by progress payments at specified times. This contract was not accompanied by any promissory note.

|183 Overmyer then became delinquent in its payments. Frick naturally refrained from further work. This impasse was resolved by the February 1967 post-contract arrangement, pursuant to which Overmyer made an immediate partial payment in cash and issued its installment note for the balance. Although Frick had suggested a confession-of-judgment clause, the note as executed and delivered contained no provision of that kind.

[1] Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession-of-judgment provision Overmyer now finds so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate.

Were we concerned here only with the validity of the June 1967 agreement under principles of contract law, that issue would be readily resolved. Obviously and undeniably, Overmyer's execution and delivery of the second note were for an adequate consideration and were the product of negotiations carried on by corporate parties with the advice of competent counsel.

More than mere contract law, however, is involved here.

III

Petitioner Overmyer first asserts that the Ohio judgment is invalid because there was no personal service upon it, no voluntary appearance by it in Ohio, and no genuine appearance by an attorney on its behalf. Thus, |184 it is said, there was no personal jurisdiction over Overmyer in the Ohio proceeding. The petitioner invokes Pennoyer v. Neff, 95 U.S. 714, 732, 24 L.Ed. 565 (1878), and other cases decided here and by the Ohio courts enunciating accepted and long-established principles for *in personam* jurisdiction. McDonald v. Mabee, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608 (1917); Vanderbilt v. Vanderbilt, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456 (1957); Sears v. Weimer, 143 Ohio St. 312, 55 N.E.2d 413 (1944); Railroad Co. v. Goodman, 57 Ohio St. 641, 50 N.E. 1132 (1897); Cleveland Leader Printing Co. v. Green, 52 Ohio St. 487, 491, 40 N.E. 201, 203 (1895).

It is further said that whether a defendant's appearance is voluntary is to be determined at the time of the court proceeding, not at a much earlier date when an agreement was signed; that an unauthorized appearance by an attorney on a defendant's behalf cannot confer jurisdiction; and that the lawyer who appeared in Ohio was not Overmyer's attorney in any sense of the word, but was only an agent of Frick.

The argument then proceeds to constitutional grounds. It is said that due process requires reasonable notice and an opportunity to be heard, citing Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). It is acknowledged, however, that the question

here is in a context of "contract waiver, before suit has been filed, before any dispute has arisen" and "whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice."[9] In other words, Overmyer's position here specifically is that it is "unconstitutional to waive in advance the right to present a defense in an action on the note."[10] It is conceded that in Ohio a court has the power to open the judgment upon a proper showing. Bellows v. Bowlus, 83 Ohio App. 90, 93, 82 N.E.2d 429, 432 (1948). But it is claimed that such a move is discretionary and ordinarily will not be disturbed on appeal, and that it may not prevent execution before the debtor has notice. Griffin v. Griffin, 327 U.S. 220, 231–232, 66 S.Ct. 556, 561–562, 90 L.Ed. 635 (1946). Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), and Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), are cited.

[2] The due process rights to notice and hearing prior to a civil judgment are subject to waiver. In National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), the Court observed:

> "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." *Id.*, at 315–316, 84 S.Ct., at 414.

And in Boddie v. Connecticut, *supra*, the Court acknowledged that "the hearing required by due process is subject to waiver." 401 U.S., at 378–379, 91 S.Ct., at 786.

This, of course, parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved. Illinois v. Allen, 397 U.S. 337, 342–343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353 (1970) (right to be present at trial); Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966) (rights to counsel and against compulsory self-incrimination); Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963) (habeas corpus); Rogers v. United States, 340 U.S. 367, 371, 71 S.Ct. 438, 440, 95 L.Ed. 344 (1951) (right against compulsory self-incrimination).

Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970); Miranda v. Arizona, 384 U.S., at 444, 86 S.Ct., at 1612, or "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); Fay v. Noia, 372 U.S., at 439, 83 S.Ct., at 849, and even if, as the Court has said in the civil area, "[w]e do not presume acquiescence in the loss of fundamental rights," Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937), that standard was fully satisfied here.

Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many States and has been party to "tens of thousands of contracts with many contractors." This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from

9. Brief for Petitioners 16.

10. Trans. of Oral Arg. 17.

Overmyer came into being, it, too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed.

Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision. Indeed, it could not do so in the light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the progress payments, was executed without it. It appeared in the second note delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer. Particularly important, it would seem, was the ⊥187 release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time and interest rate.

[3] Overmyer may not have been able to predict with accuracy just how or when Frick would proceed under the confession clause if further default by Overmyer occurred, as it did, but this inability does not in itself militate against effective waiver. See Brady v. United States, 397 U.S., at 757, 90 S.Ct., at 1473; McMann v. Richardson, 397 U.S. 759, 772–773, 90 S.Ct. 1441, 1449–1450, 25 L.Ed.2d 763 (1970).

[4] We therefore hold that Overmyer, in its execution and delivery to Frick of the second installment note containing the cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.

Insurance Co. v. Morse, 20 Wall. 445, 22 L.Ed. 365 (1874), affords no comfort to the petitioners. That case concerned the constitutional validity of a state statute that required a foreign insurance company, desiring to qualify in the State, to agree not to remove any suit against it to a federal court. The Court quite naturally struck down the statute, for it thwarted the authority vested by Congress in the federal courts and violated the Privileges and Immunities Clause.

Myers v. Jenkins, 63 Ohio St. 101, 120, 57 N.E. 1089, 1093 (1900), involving an insurance contract that called for adjustment of claims through the company alone and without resort to the courts, is similarly unhelpful.

IV

Some concluding comments are in order:

[5] 1. Our holding necessarily means that a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process. Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as ⊥188 we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack.

2. Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.

3. Overmyer, merely because of its execution of the cognovit note, is not rendered defenseless. It concedes that in Ohio the judgment court may vacate its judgment upon a showing of a valid defense and, indeed, Overmyer had a post-judgment hearing in the Ohio court. If there were defenses such as prior payment or mistaken identity, those defenses could be asserted. And there is nothing we see that prevented Overmyer from pursuing its breach-of-contract claim against Frick in a proper forum. Here, again, that is precisely what Overmyer has attempted to do, thus far unsuccessfully, in the Southern District of New York.

The judgment is affirmed.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, with whom Mr. Justice MARSHALL concurs, concurring.

I agree that the heavy burden against the waiver of constitutional rights, which applies even in civil matters, Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937), has been effectively rebutted by the evidence presented in this record. Whatever procedural hardship the Ohio confession-of-judgment scheme worked upon the petitioners was voluntarily and understandingly self-inflicted through the arm's-length bargaining of these corporate parties.

I add a word concerning the contention that opening of confessed judgments in Ohio is merely discretionary and requires a higher burden of persuasion than is ordinarily imposed upon defendants. As I read the Ohio law of cognovit notes, trial judges have traditionally enjoyed wide discretion in vacating confessed judgments. 32 Ohio Jur.2d, Judgments § 558 (1958). In Livingstone v. Rebman, 169 Ohio St. 109, 158 N.E.2d 366 (1959), however, the Ohio Supreme Court imposed certain safeguards on the exercise of a judge's discretion in opening confessed judgments. That case also involved a petition to open a confessed judgment where, as here, the debtor alleged the affirmative defense of failure of consideration. Using the preponderance-of-the-evidence test, the trial court had found insufficient support for the debtor's claim and had dismissed the motion to open. On appeal, however, the Ohio Supreme Court reversed on the degree of proof needed to vacate a confessed judgment. Said the court:

> "[I]f there is credible evidence supporting the defense . . . from which reasonable minds may reach different conclusions, it is then the *duty* of the court to suspend the judgment and permit the issue raised by the pleadings to be tried by a jury, or, if a jury is waived, by the court." *Id.*, at 121–122, 158 N.E.2d, at 375. (Emphasis supplied.)

Thus it would appear that the Ohio confessed judgment may be opened if the debtor poses a jury question, that is, if his evidence would have been sufficient to prevent a directed verdict against him. That standard is a minimal obstacle.*

The fact that a trial judge is *duty-bound* to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate. See also Goodyear v. Stone, 169 Ohio St. 124, 158 N.E.2d 376 (1959); McMillen v. Willard Garage Inc., 14 Ohio App.2d 112, 115, 237 N.E. 2d 155, 158 (1968); Central National Bank of Cleveland v. Standard Loan & Finance, 5 Ohio App.2d 101, 104, 195 N.E.2d 597, 600 (1964).

The record shows that the petitioners were given every opportunity after judgment to explain their affirmative defense to the state courts and that the defense was rejected solely because the evidence adduced in support thereof was too thin to warrant further presentation to a jury.

* Thus the Ohio system places no undue burden of proof upon the debtor desiring to open a confessed judgment, in marked contrast to the Pennsylvania procedure involved in Swarb v. Lennox, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138. In Pennsylvania, in order to vacate such a judgment, a borrower must prove his defense by the preponderance of the evidence rather than by merely mustering enough evidence to present a jury question. Once the judgment is vacated, moreover, he must again prevail by that standard at a subsequent trial. In effect, the Pennsylvania confessed debtor is required to win two consecutive trials, not simply one. Given the proclivities of reasonable men to differ over the probative value of jury questions, the Pennsylvania requirement of twice sustaining the preponderance of the evidence imposes a stiffer burden of persuasion.

Construction. Nor has plaintiff shown that the mere fact that police and administrative investigations were conducted is evidence of an illegal search.

This complaint is groundless and summary judgment is granted as to this issue.

Since no federal question jurisdiction remains, the court declines to exercise pendent jurisdiction over plaintiff's state law claims of defamation and invasion of privacy. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Phyllis Wilson HOFFMAN, Plaintiff,

and

Equal Employment Opportunity Commission, Plaintiff–Intervenor,

v.

UNITED TELECOMMUNICATIONS, INC., et al., Defendants.

Civ. A. No. 76–223–C2.

United States District Court, D. Kansas.

June 21, 1988.

Equal Employment Opportunity Commission brought motion to have court declare that employment discrimination settlement agreement between former employee and employer prohibiting employee or her attorney from any further participation in case brought by EEOC, except that employee could testify pursuant to subpoena, was unenforceable as against public policy. The District Court, Saffels, J., held that: (1) settlement was not unenforceable as against public policy; (2) claim that settlement was unenforceable for violating Title VII's antiretaliation provision was not ripe for adjudication; and (3) settlement did not violate rule prohibiting lawyer from entering into agreement that restricts right to practice.

Motion denied.

1. Compromise and Settlement ⟹9

Settlement of former employee's employment discrimination suit prohibiting employee or her legal counsel from any further participation in case brought by Equal Employment Opportunity Commission, except that employee could testify pursuant to subpoena, was not unenforceable as against public policy; employee apparently testified concerning everything she knew relevant to case and there were no allegations that she failed to cooperate fully at least until settlement was consummated, and employee's interest in recovering monetary compensation in private settlement of employment discrimination suit that had been pending 12 years outweighed any harm to public policy that encourages cooperation in investigation of subject employer. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Federal Courts ⟹13.10

Equal Employment Opportunity Commission's claim that employment discrimination settlement prohibiting employee or her legal counsel from any further participation in case brought by Commission, except that employee could testify pursuant to subpoena, was unenforceable on ground that it violated Title VII's antiretaliation provision was not ripe for adjudication; employer had done nothing in retaliation of any act by employee. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Attorney and Client ⟹32(7)

Portion of employment discrimination settlement agreement prohibiting former employee's attorney from further participation in case brought by Equal Employment Opportunity Commission did not violate Code of Professional Responsibility Disciplinary Rules prohibition against lawyer entering into agreement that restricts right to practice; counsel did not restrict any right to practice law since all potential

plaintiffs in lawsuit were represented by Equal Employment Opportunity Commission by Commission's own choice, and therefore there would be no opportunity for counsel to advocate interests of any other person. ABA Code of Prof.Resp., DR 2-108.

Edward M. Boddington, Jr., Boddington & Brown, Kansas City, Kan., Gerald S. Hartman, George M. MacDonald/Gregory W. Homer, Vedder, Price, Kaufman, Kammholz & Day, Washington, D.C., John J. Cassidy, Jr., James S. Petrie, Michael G. Cleveland, Vedder, Price, Kaufman & Kammholz, Chicago, Ill., for defendants.

Richard J. Croker/Megan Yearout, Westwood, Kan., for United Telecommunications, Inc.

James R. Neely, Jr., Reg. Atty., Gretchen D. Huston, Supervisory Trial Atty., Robert G. Johnson, Sr. Trial Atty., Thomas J. Borek, Leslie V. Freeman, Trial Atty., E.E.O.C., St. Louis Dist. Office, St. Louis, Mo., for Intervenors E.E.O.C.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

The original plaintiff in this employment discrimination case, which happens to be the oldest lawsuit on this judge's docket and in fact predates this judge's appointment in 1979, settled her claim against defendants in full in late 1987. On October 19, 1987, the court signed off on a stipulation of dismissal by plaintiff and all defendants. By agreement of the parties, the terms of this settlement were kept confidential. This notwithstanding, the EEOC has learned that one of the provisions of the settlement prohibited plaintiff or her legal counsel from any further participation in the case, except that plaintiff could testify pursuant to a subpoena. This part of the settlement was confirmed in a letter written by plaintiff's counsel to the EEOC. The EEOC has moved to declare the settlement agreement provision unenforceable as against public policy, among other grounds.

Plaintiff originally brought this lawsuit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging discrimination against herself and a class of females. In 1984, the EEOC and plaintiff successfully petitioned the court to permit the EEOC to assume responsibility of litigating the class claims, thereby leaving plaintiff in the lawsuit solely to litigate her own individual claims of discrimination. Defendants represent that plaintiff has been deposed at great length on several occasions and has expressly testified concerning all known bases for her claims of discrimination. In addition, defendants contend that because plaintiff last worked for defendants prior to the filing of this lawsuit, she has no direct knowledge of defendants' policies or practices subsequent to 1975 and, again, has testified as to her complete knowledge of events before that date. These arguments by defendant are intended to counter the EEOC's allegation that plaintiff's refusal to voluntarily participate in further investigation will substantially hinder its pursuit of charges against defendants, and public policy should be invoked to render void this part of the settlement agreement.

The EEOC also argues that the provision barring contact with the investigation violates Title VII's prohibition against retaliation, because plaintiff is threatened with being held to have violated the settlement agreement if she voluntarily cooperates with the EEOC's prosecution of this case. Finally, the EEOC alleges that the portion of the settlement agreement prohibiting plaintiff's attorneys from further participation in the lawsuit violates the Code of Professional Responsibility, Disciplinary Rule 2-108: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."

The EEOC has cited legal authority to the effect that a waiver of the right to file a charge of discrimination is void as against public policy. Specifically, "an employer and an employee cannot agree to deny to the EEOC the information it needs to advance [the] public interest [in preventing employment discrimination]." *EEOC*

v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1090 (5th Cir.1987). In the *Cosmair* case, the court noted the following:

> Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination.... A charge not only informs the EEOC of discrimination against the employee who filed the charge or on whose behalf it is filed, but also may identify other unlawful company actions.... When the EEOC acts on this information, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."

Id. (citations omitted). It is clear that the *Cosmair* court intended to prevent agreements that restricted any attempt to keep victims of discrimination from making their claims public. To allow these claims to be kept secret by an agreement between the employer and employee would create the potential for a company to continue a pattern of discrimination and successfully avoid any penalty by buying out its victims. The Fifth Circuit's opinion does not stand for the proposition that a person in Phyllis Hoffman's situation cannot agree to voluntarily cease cooperation with the EEOC. In *Cosmair*, the policy against denying "information" to the EEOC meant that a victim of discrimination should not be discouraged to file a charge, with the charge being the "information" the EEOC is after. In the present case, a charge was filed and the EEOC has pursued it for over a decade. Plaintiff has apparently testified concerning everything she knows relevant to this case, and there is no allegation that she has failed to cooperate fully in the EEOC investigation, at least until the settlement was consummated. The public policy against denying the EEOC information concerning employment discrimination is simply not being violated in this instance.

[1] As the *Cosmair* court noted, a promise such as was made by plaintiff in the settlement agreement is unenforceable if the interest in its enforcement is outweighed under the circumstances by a public policy harmed by enforcement of the agreement. *Id.* The court finds that plaintiff's interest in recovering monetary compensation in a private settlement of an employment discrimination lawsuit that has been pending twelve years outweighs, under the circumstances of this case, any harm to the public policy that encourages cooperation in an investigation of the subject employer. Not the least justification of this holding is plaintiff's availability to testify completely and truthfully upon being subpoenaed by the EEOC. See *EEOC v. United States Steel Corp.*, 671 F.Supp. 351, 358 (W.D.Pa.1987) (finding invalid a release of claims that completely prohibited a victim of discrimination from assisting in the prosecution of a claim).

[2] The court does not find the EEOC's remaining arguments persuasive. The issue of whether the settlement violates Title VII's anti-retaliation provision is not ripe, because defendants have done nothing in retaliation of any act by plaintiff. Morever, in the *Cosmair* and *United States Steel* cases cited by the EEOC, agreements signed by potential victims of discrimination included forfeitures of certain employment benefits to which the employees were legally entitled, in the event the employees pursued a charge against the subject employer. In the present case, plaintiff is not legally entitled to have defendants pay an amount of money in settlement of her claims.

[3] Finally, the facts simply do not present the possibility of an ethical violation. In agreeing not to participate in this litigation, plaintiff's counsel is in no way restricting any right to practice law. All potential plaintiffs in this lawsuit are represented by the EEOC, by the EEOC's own choice. There will be no opportunity for plaintiff's counsel to advocate the interests of any other person. This argument is without merit.

As a final comment, the court certainly does not intend to encourage settlements

such as the one in this case. Today's decision rests solely on the peculiar facts of this lawsuit, and even a slightly different factual situation could greatly affect the court's disposition on the merits. Simply put, under the circumstances of this case, a settlement agreement limiting the plaintiff's cooperation in culminating the twelve-year-old investigation is not void as against public policy.

IT IS BY THE COURT THEREFORE ORDERED that plaintiff-intervenor's motion to declare settlement agreement provisions unenforceable be denied.

Eric E. & Peggy K. CHANDLER, Plaintiffs,

v.

UNITED STATES of America, Defendant.

No. 86–C–1105S.

United States District Court, D. Utah, C.D.

June 6, 1988.

Taxpayers sued Government for damages claiming that Internal Revenue Service had negligently made unlawful disclosure of taxpayers' return information. The District Court, Sam, J., held that: (1) prior in-court exposure of taxpayers' return information was not relevant in deciding whether subsequent IRS disclosure was unlawful, and (2) evidence supported finding that IRS was negligent in not locating taxpayers' account after receiving taxpayers' payment check supporting award of $1,000 in damages for unlawful disclosure of return information.

Ordered accordingly.

1. Internal Revenue ⇐4482

Taxpayers' filing of suit to enjoin IRS from collecting frivolous return penalty was not relevant to determining whether IRS had subsequently unlawfully disclosed return information to employer of one of taxpayers; notwithstanding prior in-court exposure of return information, propriety of disclosure would be judged strictly as to whether it fit within one of statutory grounds for disclosure. 26 U.S.C.A. § 6103.

2. Internal Revenue ⇐4482

In order to recover statutory damages for unlawful disclosure of return information, taxpayers were only required to prove simple negligence, not that IRS acted with intent or wilfulness; wilful disclosure or disclosure that was result of gross negligence would give rise to punitive damage award. 26 U.S.C.A. § 7431(a)(1).

3. Internal Revenue ⇐4482

IRS employees' failure to make reasonable effort to locate taxpayers' account, after receipt of taxpayers' check which did not contain TIN and failure to attempt notification of taxpayers to aid in locating account constituted negligence which supported award of $1,000 in damages for one act of unauthorized disclosure of return information when IRS subsequently issued notice of levy to one taxpayer's employer. 26 U.S.C.A. § 7431(c)(1).

Eric E. Chandler and Peggy K. Chandler, Centerville, Utah, pro se.

Brent D. Ward, U.S. Atty., Glen R. Dawson, Asst. U.S. Atty., Salt Lake City, Utah, Michael J. Salem, Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

RULING

SAM, District Judge.

This action is before the court for final judgment following trial without jury. Plaintiffs Eric and Peggy Chandler, appearing *pro se*, sue for damages claiming the Internal Revenue Service (IRS) negligently made an unlawful disclosure of the

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3505
Non-Argument Calendar

District Court Docket No. 81-174-CIV-T-17

NANCY McLEAN, and
JOHN McLEAN, her son,

Plaintiffs-Appellants,

versus

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,
MARY SUE HUBBARD, L. RON HUBBARD,
JOSEPH PETER LISA, MILTON WOLFE and
MERREL VANNIER,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(September 17, 1991)

Before TJOFLAT, Chief Judge, JOHNSON and EDMONDSON, Circuit Judges.

PER CURIAM:

Appellant McLean appeals the district court's order permanently enjoining her from disclosing any information about her lawsuit against

the Church of Scientology (Church) and the resulting Settlement Agreement entered into between McLean and the Church. We affirm.[1]

I

McLean and her son sued the Church in 1981. In August 1986 McLean and the Church entered into a court-supervised Settlement Agreement requiring the Church to pay an undisclosed sum to McLean and requiring McLean to turn over to the Church any documents relating to the litigation and prohibiting McLean from, among other things, discussing with anyone, other than immediate family members, the circumstances surrounding the litigation or discussing any factual evidence that might have supported the litigation. In March 1988 the Church moved for a preliminary and a permanent injunction, claiming

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[1] The outcome of this decision was delayed pending final resolution of the issues in Wakefield v. Church of Scientology, ___ F.2d ___ (11th Cir. 1991) (finding moot the motion filed by local newspapers seeking access to the Settlement Agreement entered into among the Church and various plaintiffs). Because the Wakefield decision has no impact on the merits of this case, we need discuss it no further.

that McLean was violating the terms of the Settlement Agreement and that she should be enjoined from further violations.[2]

The district court referred the matter to a magistrate judge. The magistrate judge admitted into evidence affidavits submitted by the Church, indicating that McLean had violated the terms of the settlement agreement. The magistrate judge also heard testimony from McLean, who was given a full opportunity to rebut the matters contained in the affidavit. After considering the matter, the magistrate judge issued a Report and Recommendation concluding that McLean violated the Agreement. The district court accepted the Report and Recommendation and entered against McLean a preliminary and a permanent injunction that enjoined her from further disclosing the substance of her complaint and claim against the Church, alleged wrongs committed by the Church and the substance of documents that were returned to the Church under the Settlement Agreement. This appeal followed.

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[2] Because the record in this case is under seal, our outline of the underlying facts of this appeal will be cursory.

also show that the procedures followed resulted in prejudice, i.e., that the lack of notice caused [Mclean] to withhold certain proof which would show [her] entitlement to relief on the merits." Id.; cf. Garcia v. Smith, 680 F. 2d 1327, 1328 (11th Cir. 1982). After reviewing the record, we conclude that McLean has not been prejudiced.

At the preliminary-injunction hearing, McLean testified among other things that she had reacquired certain documents turned over to the Church and that she was using these documents to "counsel" Church members. She testified further that she had discussed certain aspects of her suit against the Church with persons who were not members of her immediate family. If we view this testimony in the light most favorable to McLean and if we assume that any evidence she might have presented at a later hearing on the merits would have fully corroborated her testimony, we would still find that she violated the terms of the Settlement Agreement. So, because McLean in effect conceded that she was violating the terms of the Settlement Agreement, we conclude that she was not prejudiced by being denied notice of the consolidation of her preliminary and permanent injunction hearings.

II

McLean claims that the permanent injunction against her further disclosures should be reversed because the district court failed to give her proper notice that it consolidated the preliminary- and permanent-injunction hearings. We disagree. Although "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits," University of Texas v. Camenisch, 101 S. Ct. 1830, 1834 (1981) (citations omitted), Rule 65(a)(2) of the Federal Rules of Civil Procedure allows consolidation of the preliminary-injunction hearing and the hearing on the merits of the permanent injunction. Fed. R. Civ. P. 65(a)(2). Before preliminary- and permanent-injunction hearings can be consolidated, though, parties must have notice of consolidation. Id.; Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1106 (5th Cir. 1972).[3] The district court's failure, however, to give notice "is not a sufficient basis for appellate reversal; [McLean] must

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[3] This court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

McLean also argues on appeal that the district court erred in holding that reacquisition and disclosure of reacquired documentary evidence violated the Settlement Agreement. We find this argument to be completely without merit. If the district court had held that reacquisition alone violated the Settlement Agreement, we might be influenced. The district court, however, held that reacquisition and then disclosure violated the Settlement Agreement. We agree.

III

For the foregoing reasons, we AFFIRM the district court's order of preliminary and permanent injunctive relief to the Church.

Nebraska's experience with *793 petitions for habeas corpus, as laid before this Court by the Attorney General of Nebraska, the meager allegations of this petition for habeas corpus should preclude our attributing to the Supreme Court of Nebraska a disregard, in affirming a denial of the petition, of rights under the Constitution of the United States rather than a denial on allowable state grounds. Accordingly, I believe the judgment should be affirmed.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this view.

324 U.S. 806

PRECISION INSTRUMENT MFG. CO. et al. v. AUTOMOTIVE MAINTENANCE MACHINERY CO.

No. 377.

Argued Jan. 31 and Feb. 1, 1945.

Decided April 23, 1945.

Rehearing Denied May 21, 1945.
See 325 U.S. 893, 65 S.Ct. 1189.

Petition for Clarification of Opinion Denied June 18, 1945.
See 325 U.S. 843, 65 S.Ct. 1561.

1. Equity 🔑65(2)

The equitable maxim that he who comes into equity must come with clean hands is a self-imposed ordinance closing doors of equity court to one tainted with inequitableness or bad faith relative to matter in which he seeks relief, however improper may have been the defendant's behavior.

2. Equity 🔑65(2)

Although equity does not demand that its suitors shall have led blameless lives, it requires that they shall have acted fairly and without fraud or deceit as to controversy in issue.

3. Equity 🔑65(1)

An equity court may exercise wide range of discretion in refusing to aid litigant coming into court with unclean hands.

4. Equity 🔑65(2)

Misconduct justifying equity court in refusing relief because of unclean hands need not necessarily be of such nature as to be punishable as a crime or as to justify legal proceedings, but any wilful act concerning cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for refusing relief.

5. Equity 🔑65(2)

The equitable doctrine that he who comes into equity must come with clean hands is of greater importance where suit concerns public interests as well as private interests of litigants.

6. Patents 🔑1

A "patent" is a special privilege designed to serve public purpose of promoting progress of science and useful arts, it is affected with a public interest, and is an exception to general rule against monopolies.

See Words and Phrases, Permanent Edition, for all other definitions of "Patent".

7. Patents 🔑283(1)

A patent infringement case must be measured by both public and private standards of equity in view of public's paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct.

8. Equity 🔑65(2)

Where in prior interference proceeding, plaintiff had become cognizant of facts indicating perjury in connection with the other application, failure of plaintiff to reveal such fraud to Patent Office and its action in entering into outside settlement whereby it secured perjured application, on which it eventually obtained patents, and whereby other parties agreed not to question validity of any patent that might be issued, justified denial, on ground of unclean hands, of relief sought by plaintiff in patent infringement and breach of contract suit.

9. Equity 🔑65(2)

Where information obtained by plaintiff indicated perjury in connection with other application involved in interference proceedings, fact that information might not have seemed sufficiently trustworthy to warrant submission of case to District Attorney or to Patent Office during pendency of interference proceedings did not preclude dismissal, on ground of unclean hands, of subsequent suit for breach of contract and infringement of patents based in part on perjured application obtained by plaintiff in settlement of interference proceedings.

10. **Equity** ⊂⇒65(2)

Those who have application pending with Patent Office or who are parties to Patent Office proceedings have duty to report to it all facts concerning possible fraud or inequitableness underlying the application in issue, notwithstanding doubt as to sufficiency of proof thereof or nature of independent legal advice

11. **Equity** ⊂⇒65(2)

Although outside settlements of interference proceedings are not ordinarily illegal, clean hands doctrine precluded enforcement in equity of settlement entered into without revealing to Patent Office knowledge or reasonable belief of perjury in connection with other application.

12. **Equity** ⊂⇒65(2)

Where information indicating perjury in connection with other application involved in interference proceedings was not revealed to Patent Office, but plaintiff entered into settlement whereby parties agreed not to question validity of any patent that might be issued, fact that action of other parties in seeking to obtain fraudulent patent may have been more reprehensible than that of plaintiff did not preclude denial of relief to plaintiff in patent infringement and breach of contract suit on ground of unclean hands.

Mr. Justice ROBERTS and Mr. Justice JACKSON dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the Automotive Maintenance Machinery Company against the Precision Instrument Manufacturing Company, Kenneth R. Larson, and Snap-On Tools Corporation for breach of contracts and for infringement of three patents relating to torque wrenches, which was consolidated with a suit by Snap-On Tools Corporation for a declaratory decree with respect to the same controversy, wherein the Automotive Maintenance Machinery Company filed a counterclaim seeking substantially the same relief as in the original action. To review a judgment of the Circuit Court of Appeals, 143 F.2d 332, affirming in part and reversing in part a judgment of the District Court dismissing the various complaints and counterclaims for want of equity, the defendants bring certiorari.

Judgment of the Circuit Court of Appeals reversed.

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Mr. Casper W. Ooms, of Chicago, Ill., for petitioners.

Mr. Frank Parker Davis, of Chicago, Ill., for respondent.

Mr. Justice MURPHY, delivered the opinion of the Court.

The respondent, Automotive Maintenance Machinery Company, charged in two suits that the various petitioners had infringed three patents owned by it relating to torque wrenches.[1] It was further asserted that the allegedly infringing acts also breached several contracts related to the patents. In defense, the petitioners claimed inter alia that Automotive possessed such "unclean hands"

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as to foreclose its right to enforce the patents and the contracts.

The District Court, at the close of a consolidated trial on the sole issue of Automotive's alleged inequitable conduct, delivered an oral opinion holding that Automotive's hands were soiled to such an extent that all relief which it requested should be denied. This opinion was subsequently withdrawn at the request of one of the witnesses and is not a part of the record. At the same time, however, the court entered written findings of fact and conclusions of law, forming the basis for a judgment dismissing the various complaints and counterclaims "for want of equity." On appeal, the Circuit Court of Appeals reviewed the facts at length and concluded that the District Court's findings of fact were not supported by substantial evidence and that its conclusions of law were not supported by its findings. The judgment was accordingly reversed. 7 Cir., 143 F.2d 332. We brought the case here because of the public importance of the issues involved.

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1 The three patents involved are No. 2,279,792, issued on April 14, 1942, to Kenneth R. Larson; No. 2,283,888, issued on May 19, 1942, to H. W. Zimmerman; and reissue No. 22,219, issued on November 3, 1942, to H. W. Zimmerman, based on original No. 2,269,503.

The basic facts necessary to a determination of the vital issues are clear and without material dispute. In chronological order they may be summarized as follows:

In 1937 and prior thereto Automotive manufactured and sold torque wrenches developed by one of its employees, Herman W. Zimmerman. During this period Snap-On Tools Corporation was one of its customers for these wrenches. Automotive also had in its employ at this time one George B. Thomasma, who worked with Zimmerman and who was well acquainted with his ideas on torque wrenches. In November, 1937, Thomasma secretly gave information to an outsider, Kenneth R. Larson, concerning torque wrenches. Together they worked out plans for a new wrench, although Thomasma claimed that it was entirely his own idea.

After unsuccessfully trying to interest other distributors, Larson made arrangements to supply Snap-On with

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the new torque wrench. On October 1, 1938, Larson filed an application for a patent on the newly-developed wrench, which application had been assigned to Snap-On several days prior thereto.[2] Then in December, 1938, Larson, Thomasma and one Walter A. Carlsen organized the Precision Instrument Manufacturing Company to make the wrenches to supply Snap-On's requirements. All three received stock and were elected officers and directors of the new company. Manufacture of the wrenches began in January, 1939, and Precision succeeded in taking away from Automotive all of Snap-On's business. Thomasma continued to work for Automotive until the latter discovered his connection with Precision and discharged him in June, 1939. Thomasma's connection with Precision was also concealed from Snap-On during most of this period.

Subsequently on October 11, 1939, the Patent Office declared an interference between certain claims in Larson's pending patent application and those in one filed by Zimmerman. Automotive was the owner of Zimmerman's application. Shortly after the interference was declared, R. E. Fidler, Automotive's attorney, wrote to the president of the company that the "whole situation confronting your opponents in this interference is quite messy, and I will be somewhat surprised if they fight the matter." He further wrote that if there was a contest "they surely will have a lot of explaining to do."

In August, 1940, Larson filed his preliminary statement in the Patent Office proceedings. In it he gave false dates as to the conception, disclosure, drawing, description and reduction to practice of his claimed invention. These dates were designed to antedate those in Zimmerman's

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application by one to three years. Larson also claimed that he was the sole inventor of his wrench. When Fidler learned of this preliminary statement he immediately suspected that "there must be something wrong with this picture" and suggested to Automotive's president that a "very careful and thorough investigation" be made of the situation. The president agreed. Fidler then employed several investigators who made oral reports to him from time to time. According to Fidler's memoranda of these reports, Fidler learned in great detail in August and September, 1940, the part that Thomasma played in the development of the Larson wrench and in the organization of Precision. He discovered that Thomasma claimed to have invented the wrench and that Larson "was now trying to freeze him out."

From October 24 to November 4, 1940, Larson and eight witnesses testified in the interference proceedings in support of his claims, corroborating his statements as to dates despite cross examination. The day before this testimony ended Thomasma met with Fidler and Automotive's president and stated that he had developed Larson's wrench and that Larson's patent application was a "frame-up." Fidler then procured from Thomasma an eighty-three page statement concerning these matters, which Thomasma swore to on November 15. As the District Court found, this statement or affidavit "related in extensive detail the statements of Thomasma with respect to Larson's early work and disclosed such intimate knowledge thereof as to leave little doubt of the author's knowledge of the facts."

With these facts before him, Fidler ad-

[2] Snap-On agreed to file the patent application for Larson, who was without funds, and took an assignment of the Larson application as security for performance of the agreement to supply wrenches.

mitted that he "personally was inclined to take the position that I should do something drastic" in the form of taking the matter up with the Patent Office or the District Attorney. He resolved his problem, however, by submitting it to an outside

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attorney. The latter advised him that his evidence was insufficient to establish Larson's perjury, that the Patent Office would not consider the matter until all proofs in the interference proceedings were in and that the District Attorney probably would not touch the situation while the interference proceedings were pending. Fidler followed his advice.

A few days later Fidler informed Larson's patent attorney, Harry C. Alberts, of the information disclosed in the Thomasma affidavit. Alberts admitted that "it looked very much like Larson had given false testimony" and asked that further examination of Thomasma be made in his presence. Accordingly, on November 28, Thomasma was examined orally before Alberts, Fidler and officials of Automotive and Snap-On. Thomasma repeated substantially the same story as in his affidavit. Snap-On's president said that if the story were true "the whole thing smells to the high heavens." And Alberts remarked that under the circumstances he felt he would have to withdraw as Larson's attorney.

On the same day, Alberts and Snap-On's president confronted Larson and Carlsen with the Thomasma story and demanded an explanation. Larson refused to commit himself on the truth of Thomasma's account but finally admitted that "my testimony is false and the whole case is false." Alberts then withdrew as their attorney,[3] giving them the names of three other lawyers, including M. K. Hobbs. The fact that Alberts withdrew was communicated by him to Fidler.

Larson and Carlsen called on Hobbs the next day, November 29. They told him they were willing to concede

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priority in Zimmerman and wanted Hobbs to settle the interference proceedings.[4] Hobbs took the case on that basis, making no effort to inquire into the reasons for the concession since he considered that matter immaterial. Even when Fidler tried to tell him later about the perjury, Hobbs stopped him for he "didn't want to hear the conflict in testimony."

Hobbs immediately undertook to settle the interference proceedings. On December 2 he proposed a settlement which included a concession of priority by Larson, but this proposal was apparently not satisfactory to all those concerned. Meanwhile Fidler presented the facts to another disinterested lawyer and asked him whether he thought there was enough evidence to bring a conspiracy suit for damages or a criminal action. The lawyer, after admitting that he did not have the slightest doubt but that Thomasma was telling the truth, replied in the negative.

On December 13 Fidler submitted a draft agreement that he had prepared. This draft contained a recital that "it has been determined by the parties hereto and their respective counsel that the party Zimmerman is the prior inventor of the subject matter involved in said Interference No. 77,565, as well as all other subject matter commonly disclosed in said Zimmerman and Larson applications." But this draft was likewise unacceptable.

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For a time negotiations were broken off and resumption of the interference proceedings seemed imminent. One of the other attorneys for Automotive wrote a letter on December 19 to Alberts, who was still acting as attorney for Snap-On, stating that "you must recognize that a large part of the

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[3] Alberts apparently never withdrew formally as Larson's attorney in the interference proceedings by filing a document to that effect in the Patent Office.

[4] Both Larson and Carlsen testified that they told Hobbs of the perjury and of the predicament they were in, stating to him that they did not want to be turned over to the District Attorney. Hobbs, however, denied that they informed him of these matters. It was at the request of Hobbs that the District Court's oral opinion was withdrawn in order that, in the words of the District Court, it would not be "construed as implying that Mr. Hobbs had willfully given false testimony or had been guilty of professional misconduct." The court further said that the record demonstrated "that the witness Hobbs did not testify falsely." Assuming that Hobbs gave no false testimony, however, we do not consider that fact to be of controlling significance in this case.

testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth" and that "you are holding up the issuance of the Zimmerman patent without the slightest justification." Fidler, who had approved this letter, justified these remarks on the ground that "they had told us Zimmerman was the prior inventor and we hadn't yet received a concession of priority." In reply to this letter, Alberts charged that Automotive's attorneys were using "threatening accusations" and "duress" and that they were threatening to "unloose the dogs" unless they got everything they requested in the settlement.

Suddenly on the next day, December 20, negotiations were resumed and the parties quickly entered into three contracts, the first two of which are involved in this suit. These contracts, in the relevant parts, provided as follows:

(1) Under the Automotive and Precision-Larson agreement, Larson conceded priority in Zimmerman and Larson's application was to be assigned to Automotive. Automotive agreed to license Larson and Precision to complete their unfilled order from Snap-On to the extent of about 6,000 wrenches, with a royalty to be paid on the excess. Automotive released Precision, Larson and their customers from liability for any past infringement and gave Precision and Larson a general release as to all civil damages. Finally, Precision and Larson acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications.

(2) Under the Automotive and Snap-On agreement, Snap-On agreed to reassign the Larson application to Precision

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and acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications. Automotive also gave Snap-On the right to sell the 6,000 wrenches then on order from Precision and released Snap-On from any past liability or damages.

(3) Under the Snap-On and Precision-Larson agreement, Snap-On reassigned to Larson and Precision whatever title Snap-On had to the Larson application. Precision agreed to manufacture and deliver to Snap-On the 6,000 wrenches then on order. Snap-On also assented to the Automotive and Precision-Larson agreement.

The Larson application was accordingly assigned to Automotive on December 20, 1940. Automotive subsequently received patents on both the Larson and Zimmerman applications after making certain changes. Then Precision began to manufacture and Snap-On began to sell a new wrench. Automotive claimed that this was an infringement of its patents and a breach of the contracts of December 20, 1940. Thus the suit arose which is now before us.

[1, 2] The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughran v. Loughran, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and

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without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 397-399.

[3, 4] This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of

conduct is sufficient cause for the invocation of the maxim by the chancellor.

[5] Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788, 62 S.Ct. 402, 405, 406, 86 L.Ed. 363.

[6, 7] In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are "issues of great moment to the public." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250. See also Mercoid Corporation v. Mid-Continent Investment Co., 320 U.S. 661, 665, 64 S.Ct. 268, 271, 88 L.Ed. 376; Morton Salt Co. v. Suppiger Co., supra; United States v. Masonite Corp., 316 U.S.
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265, 278, 62 S.Ct. 1070, 1077, 86 L.Ed. 1461. A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the "Progress of Science and useful Arts." At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. And when such measurements are made, it becomes clear that the District Court's action in dismissing the complaints and counterclaims "for want of equity" was more than justified.

[8] The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury. Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent. Yet Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the Larson application itself, turned it into a patent and barred the other parties from ever questioning its validity. Such conduct does not conform to minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and contracts.

Automotive contends that it did not have positive and conclusive knowledge of the perjury until the pleadings
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in the instant proceedings were filed and until Larson admitted his perjury on pre-trial examination. It claims that prior thereto it only had Thomasma's affidavit and statements, which were uncorroborated and likely to carry little weight as against Larson and his eight witnesses. It is further pointed out that Fidler submitted what he knew of the facts to at least two independent attorneys, both of whom advised him that the evidence of perjury that he possessed was insufficient. From this it is argued, as the Circuit Court of Appeals held, that while Automotive was "morally certain that Thomasma's story was true" there was no duty to report this uncorroborated information to either the District Attorney or the Patent Office.

[9] But Automotive's hands are not automatically cleansed by its alleged failure to possess sufficiently trustworthy evidence of perjury to warrant submission of the case to the District Attorney or to the Patent Office during the pendency of the interference proceedings. The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured. Yet it acted in complete disregard of that belief. Never for a moment did Automotive or its representatives doubt the existence of this fraud. Fidler suspected it soon after he knew of Larson's claims. His suspicions were confirmed by his hired investigators. Then Thomasma revealed such intimate and detailed facts concerning the

perjury as to convince all who heard him, despite certain reservations entertained by some persons concerning his trustworthiness. Moreover, Fidler was well aware that Alberts threatened to withdraw as Larson's counsel if he discovered from Larson that Thomasma's story was true and that Alberts in fact did so withdraw. The suspected perjury was further confirmed by Larson's sudden willingness to concede priority after he learned of

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Thomasma's story and by the admissions by Alberts and Snap-On that Zimmerman "was the prior inventor." And the very fact that Fidler saw fit to submit his proof to outside attorneys for advice is an indication of the substantiality of his belief as to Larson's perjury. With all this evidence before it, however, Automotive pursued the following course of action:

[10] 1. It chose to keep secret its belief and allegedly unsubstantial proof of the facts concerning Larson's perjury. We need not speculate as to whether there was sufficient proof to present the matter to the District Attorney. But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. Cf. Crites, Inc. v. Prudential Ins. Co., 322 U.S. 408, 415, 64 S.Ct. 1075, 1079, 88 L.Ed. 1356. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the "mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra, 322 U.S. 246, 64 S.Ct. 1001, 88 L.Ed. 1250.

[11] 2. Instead of pursuing the interference proceedings and proving the fact that Zimmerman's claims had priority

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over those asserted by Larson, Automotive chose to enter into an outside settlement with Larson, Precision and Snap-On, whereby Larson conceded priority. Outside settlements of interference proceedings are not ordinarily illegal. But where, as here, the settlement is grounded upon knowledge or reasonable belief of perjury which is not revealed to the Patent Office or to any other public representative, the settlement lacks that equitable nature which entitles it to be enforced and protected in a court of equity.

[12] 3. By the terms of the settlement, Automotive secured the perjured Larson application and exacted promises from the other parties never to question the validity of any patent that might be issued on that application. Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it without ever attempting to reveal to the Patent Office or to anyone else the facts it possessed concerning the application's fraudulent ancestry. Automotive thus acted to compound and accentuate the effects of Larson's perjury.

These facts all add up to the inescapable conclusion that Automotive has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of Larson and Precision may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims infected with fraud and perjury is too great to be overridden by such a consideration. Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects. Instead, Automotive acted affirmatively to magnify and increase those effects. Such inequitable conduct impregnated Automotive's entire cause of action and justified dismissal by resort to the unclean hands doctrine. Keystone Driller Co. v. General Excavator Co., supra.

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We conclude, therefore, that the evidence clearly supported the District Court's findings of fact and that these findings justified its conclusions of law. The court below erred in reversing its judgment.

Reversed.

Mr. Justice ROBERTS.

I think the writ should be dismissed or the judgment of the Circuit Court of Appeals affirmed. The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties. In my view it is not the function of this court to weigh the facts for the third time in order to choose between litigants, where appraisal of the conduct of each must affect the result.

Mr. Justice JACKSON is of the opinion that the judgment should be affirmed, as he takes the view of the facts set forth in the opinion of the court below. 143 F.2d 332, supra.

324 U.S. 768

UNITED STATES v. BEUTTAS et al.

No. 431.

Argued March 1, 1945.

Decided April 23, 1945.

As Amended May 21, 1945.

1. United States ⚷70(2)

Where a government construction contract provided that contractor's workmen should be paid specified minimum wages, and that the government might establish higher wages, adjusting contract price accordingly, and that any claims for additional compensation made by contractor because of the payment of wages in excess of rates fixed would not be considered, and the government did not expressly avail itself of option to set higher wage rates, contractor could not recover increased costs caused by the payment of wages in excess of rates fixed.

2. United States ⚷70(2)

Where contract for construction of foundations for housing project fixed minimum wages to be paid to contractor's workmen with right in the government to raise the wages and adjust contract accordingly, by subsequently inviting bids for the superstructure at minimum wages higher than those fixed in contract for foundations, the government did not thereby breach an implied condition that it would not hinder contractor in discharge of his obligations, so as to render the government liable for increased costs resulting from payment of higher wages following wage disputes, in the absence of any showing that the government should have anticipated the breach of existing wage agreement by contractor's employees, or that the government took any part in the wage controversy. On Writ of Certiorari to the Court of Claims.

Action by Joseph H. Beuttas and others, trading as the B-W Construction Company, against the United States to recover increased wage costs in the performance of a government contract for the construction of a public housing project. To review a judgment for plaintiffs entered in the Court of Claims, 60 F.Supp. 771, 101 Ct.Cl. 748, the United States brings certiorari.

Reversed and remanded in part for further proceedings and affirmed in part.

Mr. Ralph F. Fuchs, of Washington, D. C., for petitioner.

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Mr. P. J. J. Nicolaides, of Washington, D. C., for respondents.

Mr. Justice ROBERTS delivered the opinion of the Court.

The respondents executed a contract with the petitioner whereby they agreed to construct the foundations for a public housing project. By Article 19 they agreed that workmen of designated classes should be paid specified minimum wages, and if, during the progress of the work, the petitioner should find it desirable that wages higher than those specified should be paid, it might establish different rates, and in such case the contract price should be adjusted accordingly.

The respondents paid wages higher than those named in the contract, and brought this action, inter alia, to recover the difference. They introduced evidence to prove that commencement of the work was suspended by delays on the part of petitioner's officers and by other conditions for which the respondents were not responsible; that

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT, February 1992

Joseph P. Sullivan, J.P.
John Carro
Ernst H. Rosenberger
Richard W. Wallach
Israel Rubin, JJ.

APR 16 1992

Ivana Trump,

Plaintiff-Respondent,

-against-

Donald J. Trump,

Defendant-Appellant.

45386 and M-177

Defendant-appellant appeals from a supplemental judgment, Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered May 29, 1991, which, pursuant to a stipulation of settlement, resolved the plaintiff's action challenging the enforceability of the parties' post-nuptial agreement.

Jay Goldberg, of counsel (Judd Burstein, with him on the brief, Tenzer, Greenblatt, Fallon and Kaplan, attorneys) for defendant-appellant,

Robert Stephan Cohen, of counsel (Jonathan W. Lubell and Arlene R. Smoler, with him on the brief, Morrison Cohen Singer & Weinstein, attorneys) for plaintiff-respondent.

SULLIVAN, J.

The husband appeals from a supplemental judgment which, pursuant to a stipulation of settlement, resolved the wife's action challenging the enforceability of the parties' post-nuptial agreement. In their stipulation, the parties, subject to a number of specific modifications not here relevant, explicitly ratified the post-nuptial agreement, including a certain confidentiality provision. A proposed supplemental judgment incorporating by reference the post-nuptial agreement, as modified by the stipulation of settlement, was thereafter submitted to the court, which, sua sponte, without notice to the parties or explanation, excluded the confidentiality provision from incorporation into the supplemental judgment. Since the court's unilateral action in deleting the confidentiality provision was both unjustified and unauthorized, we modify to vacate the deletion.

Married on April 9, 1977, the parties, with the advice of separate counsel, on December 24, 1987, entered into a post-nuptial agreement (the Agreement), which superceded three prior agreements dated March 22, 1977, July 24, 1979 and May 25, 1984, respectively. Paragraph 9(b) of the Agreement set out, in the event of divorce or separation, the parties' rights and

obligations, including, _inter alia_, the husband's obligation to pay $350,000 per annum to the wife as maintenance and $10,000,000 in a lump sum within 90 days after entry of a decree of divorce. Paragraph 10 of the Agreement provides:

> Without obtaining [the husband's] written consent in advance, [the wife] shall not directly or indirectly publish, or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning her marriage to [the husband] or any other aspect of [the husband's] personal, business or financial affairs, or assist or provide information to others in connection with the publication or dissemination of any such material or excerpts thereof. *** Any violation of the terms of this Paragraph (10) shall constitute a material breach of this agreement. In the event such breach occurs, [the husband's] obligations pursuant to Paragraph (9) hereof, to make payments or provisions to or for the benefit of [the wife], shall thereupon terminate. In addition, in the event of any such breach, [the wife] hereby consents to the granting of a temporary or permanent injunction against her (or against any agent acting in her behalf) by any court of competent jurisdiction prohibiting her (or her agent) from violating the terms of this Paragraph.

Paragraph 12 of the Agreement states:

> In the event that an action for divorce is instituted at any time hereafter by either party against the other in any court of competent jurisdiction, the parties hereto agree that they nevertheless shall be bound by all of the terms of this Agreement. To

the extent possible and appropriate this Agreement shall be incorporated in the decree to be entered in such action and shall not be merged therein. If there be anything in such judgment or decree inconsistent with any of the terms or provisions of this Agreement, the terms and conditions of this Agreement shall govern and shall survive such decree.

In March, 1990, the wife commenced an action, alleging, inter alia, that, to the extent the Agreement provides that she has waived her claims to marital property under Domestic Relations Law §236, it is unconscionable and the product of overreaching and fraud and, thus, unenforceable and seeking a declaration to that effect. The wife subsequently instituted an action for divorce. Both cases were assigned to the same IAS court, which, without resolving the issue as to the enforceability of the Agreement, on December 12, 1990, granted the wife a judgment of divorce on the ground of cruel and inhuman treatment.

Thereafter, on March 22, 1991, the parties, after extensive negotiations, disposed of the declaratory judgment action by entering into a stipulation of settlement which, except for certain modifications not relevant herein, expressly ratified all the provisions of the Agreement. The stipulation further provided, "[The wife's] acceptance of the check for $10,000,000 tendered herewith on the evening of March 22, 1991 shall constitute the parties' irrevocable acceptance of the terms of

this stipulation and any documents executed in connection herewith." The wife withdrew her claims challenging the enforceability of the Agreement and, on May 22, 1991, the IAS court signed a supplemental judgment incorporating by reference all the terms of the Agreement, as modified by the March 22, 1991 stipulation of settlement, except paragraph 10, which it, sua sponte and without explanation or notice to the parties, excluded.

It is well settled that, in the absence of any affront to public policy, parties to a civil dispute have the right to chart their own litigation course. (T.W. Oil, Inc. v. Consolidated Edison Co. of New York, Inc., 57 NY2d 574, 579-580.) "[C]ourts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes." (Mitchell v. New York Hosp., 61 NY2d 208, 214.) In disposing of such litigation, parties "may stipulate away statutory, and even constitutional rights." (Matter of New York, Lackawanna & Western R.R. Co., 98 N.Y. 447, 453; see, Matter of Abramovich v. Board of Educ., 46 NY2d 450, 456, cert. den., 444 U.S. 845 [waiver of due process right to a hearing]; Matter of Sonenberg v. Fuller, 114 AD2d 677 [waiver of due process and equal protection rights].) Of course, given a showing of cause sufficient to invalidate a contract, such as fraud, collusion, mistake or some such similar ground, a court may relieve a party

from the consequences of his or her stipulation. (1420 Concourse Corp. v. Cruz, 135 AD2d 371, 372.)

Quite apart from the latter considerations, the wife contends that in declining to incorporate the confidentiality clause of the Agreement into the supplemental judgment of divorce, the IAS court properly invoked the discretion specifically afforded it by the parties in paragraph 12 of the Agreement. She argues that since the court was bound to incorporate the terms of the Agreement "[t]o the extent possible and appropriate," it was vested with the discretion to refuse to incorporate those provisions it deemed inappropriate. To interpret the phrase "[t]o the extent possible and appropriate" as conferring upon the court the unfettered discretion to pick and choose the terms of the Agreement, as ratified by the stipulation of settlement, it deemed appropriate for incorporation would result in a complete undoing of the settlement and violate the principle that the parties are free to chart their own litigation course. The only reasonable interpretation of the clause is that it authorizes the court, for sound reasons and after notice to the parties, to refuse to incorporate some of the terms of the Agreement. Thus, contrary to the wife's arguments, paragraph 12 itself does not afford the court any more authority to interfere with the parties' own agreement than the court would have under existing law.

Moreover, and perhaps more important, is the manner in which the IAS court refused to incorporate paragraph 10. Even assuming that the court had a sound basis for refusing to enforce the confidentiality clause, as a matter of procedural due process, the parties were entitled to notice and an opportunity to be heard before the court, sua sponte, altered the terms of their agreement. The use of the word "appropriate" in paragraph 12 can only be reasonably interpreted as contemplating that the decision not to incorporate a provision of the Agreement would be discussed and that any attempt to limit the incorporation of any provision would be made to the court on appropriate notice and with an opportunity to be heard. In the absence of any indication that the parties had such notice, it is apparent that the court acted without authority in excluding paragraph 10 from incorporation into the supplemental judgment. Moreover, in the absence of some explanation of the court's refusal to incorporate paragraph 10, we are not in a position to review the merits of its actions.

The wife also advances a substantive argument justifying the court's refusal to incorporate paragraph 10 into the supplemental judgment. She claims that, absent a compelling state interest, the federal and New York State constitutions bar a court from issuing a prior restraint barring an individual from ever publishing any statements about a specific subject. Of course,

we can only speculate that this was the rationale for the court's actions since, as noted, it gave no explanation as to its reasons. Furthermore, the constitutional prohibition against prior restraint applies only to orders issued by the government. In arguing that a divorce judgment incorporating the terms of a post-nuptial agreement is the equivalent of a governmental order, the wife takes a great leap in logic. We reject such a premise.

Nor is there any evidence or indeed any claim that the Agreement was the product of fraud, collusion, mistake, accident, or some such similar ground. While the supplemental judgment was entered in the context of a lawsuit in which the wife had originally claimed fraud and duress, those claims had been withdrawn and the court, by incorporating the Agreement into the judgment, placed its own stamp of approval on its terms, as well as on the wife's withdrawal of her fraud and duress claims.

In any event, even in the absence of the trial court's approval, there is no basis for a fraud or duress claim with respect to paragraph 10 of the Agreement. In commencing an action challenging the validity of the Agreement, the wife sought a declaration that it is unenforceable only to the extent that it provides that the wife has waived her claim to marital property or restricted the rights of the children of the marriage. At no time did she claim that paragraph 10 was the result of fraud or duress. When, on March 22, 1991, the parties entered into a

settlement of that action, they agreed to modify certain portions of the Agreement and to ratify the unchanged portions. Thus, the wife twice agreed to abide by paragraph 10: in 1987 when she signed the Agreement and in 1991 when she entered into the stipulation of settlement; she was represented by counsel on both occasions.

Since it is clear that the trial court exceeded its "limited authority to disturb the terms of a separation agreement" (Kleila v. Kleila, 50 NY2d 277, 283) and paragraph 10 does not, on its face, offend public policy as a prior restraint on protected speech (see, Snepp v. United States, 444 U.S. 507), we modify to incorporate the terms of said agreement into the supplemental judgment as agreed to by the parties.

Accordingly, the supplemental judgment of divorce of the Supreme Court, New York County (Phyllis Gangel-Jacob, J.), entered May 29, 1991, should be modified, on the law, to delete therefrom the exception of paragraph 10 of the December 24, 1987 post-nuptial agreement from incorporation therein and, except as

thus modified, affirmed, without costs or disbursements.

M-177 <u>Trump v Trump</u>

Motion by plaintiff-respondent to strike statements of alleged fact in appellant's brief is denied.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: April 16, 1992

Catherine O'Hagan Wolfe
Clerk. ~~DEPUTY CLERK~~

Statutory Today

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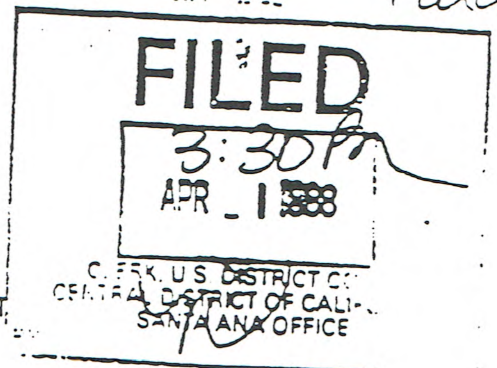


UNITED STATES DISTRICT COURT

CENTRAL DISTRICT, STATE OF CALIFORNIA

VICKI J. AZNARAN and RICHARD N. AZNARAN, Plaintiffs, vs. CHURCH OF SCIENTOLOGY OF CALIFORNIA, INC.; CHURCH OF SPIRITUAL TECHNOLOGY, INC.; SCIENTOLOGY MISSIONS INTERNATIONAL, INC.; RELIGIOUS TECHNOLOGY CENTER, INC.; AUTHOR SERVICES, INC.; CHURCH OF SCIENTOLOGY INTERNATIONAL, INC.; CHURCH OF SCIENTOLOGY OF LOS ANGELES, INC.; MISSION OFFICE WORLDWIDE; AUTHOR FAMILY TRUST; THE ESTATE OF L. RON HUBBARD; DAVID MISCAVIGE; and NORMAN STARKEY Defendants.	CASE NO. CV 88-1786-WDK (Ex) COMPLAINT FOR FALSE IMPRISONMENT; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; LOSS OF CONSORTIUM; CONSPIRACY; BREACH OF CONTRACT; RESTITUTION; FRAUD; INVASION OF PRIVACY; BREACH OF STATUTORY DUTY TO PAY MINIMUM WAGES AND OVERTIME [Cal. Lab. C.§1194] AND CONSTRUCTIVE FRAUD

COME NOW Plaintiffs VICKI J. and RICHARD N. AZNARAN, and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction for all of Plaintiffs' claims is proper under 28 USC §1332 because complete diversity exists between all Plaintiffs and all Defendants, and the amount in controversy exceeds Ten Thousand Dollars ($10,000.00). Venue is

1 proper under 28 USC §§1391(b) and 1392 because all of Plaintiffs'
2 claims arose in this District and one or more of the Defendants
3 resides in this District.

4 COMMON ALLEGATIONS

5 2. Plaintiffs VICKI J. AZNARAN and RICHARD N. AZNARAN
6 (hereinafter "Plaintiffs"), are individuals domiciled in the
7 State of Texas, County of Dallas.

8 3. Plaintiffs are informed and believe and thereon
9 allege that Defendants CHURCH OF SCIENTOLOGY OF CALIFORNIA, INC.,
10 CHURCH OF SPIRITUAL TECHNOLOGY, INC., SCIENTOLOGY MISSIONS
11 INTERNATIONAL, INC., RELIGIOUS TECHNOLOGY CENTER, INC., AUTHOR
12 SERVICES, INC., AND CHURCH OR SCIENTOLOGY INTERNATIONAL, INC. and
13 CHURCH OF SCIENTOLOGY OF LOS ANGELES, INC., are, and at all times
14 herein mentioned were, California corporations authorized to do
15 and doing business in the State of California.

16 4. Plaintiffs are informed and believe and thereon
17 allege that Defendants AUTHOR FAMILY TRUST, MISSION OFFICE
18 WORLDWIDE, and the ESTATE OF L. RON HUBBARD are entities that are
19 residents of the State of California.

20 5. Plaintiffs are informed and believe and thereon
21 allege that Defendants DAVID MISCAVIGE and NORMAN STARKEY are
22 individuals domiciled in the State of California.

23 6. Corporate Defendants named in paragraph 2, above,
24 are subject to a unity of control, and the separate alleged
25 corporate structures were created as an attempt to avoid payment
26 of taxes, and civil judgments. Due to the unity of personnel,
27 commingling of assets, and commonality of business objectives,
28 the attempt at separation of these corporations should be
disregarded by the Court.

1 7. The fallacious designations of Defendant
2 organization as "Churches" or other religious entities is a sham
3 contrived to exploit protections of the First Amendment of the
4 United States Constitution, and at no time herein mentioned did
5 Defendants render any religious services, or engage in any
6 religious activities whatsoever. Rather, said organizations were
7 created solely for the purpose of making money from the sale of
8 copyrights of the book Dianetics, written by L. RON HUBBARD, and
9 from the subjugation and exploitation of thousands of individuals
10 such as Plaintiffs for free labor and services.
11 8. Each of the Defendants is the agent,
12 coconspirator, partner or employee of the other, and did the acts
13 alleged herein pursuant to said relationship.
14 9. From the period in or about November of 1973 until
15 in or about May of 1987, Plaintiffs were members of the CHURCH OF
16 SCIENTOLOGY (hereinafter the "Church"). Plaintiff RICHARD N.
17 AZNARAN (hereinafter "RICHARD") was indoctrinated into the Church
18 in Dallas, Texas, upon returning from service with the Unites
19 States Marine Corps in Vietnam, by active recruitment techniques
20 which involved written examinations, assignment to "communication
21 courses" for which Plaintiffs paid good and adequate
22 consideration, and assignments to different job positions within
23 the Church. Plaintiff VICKI AZNARAN was also recruited by the
24 Church in Dallas, Texas in or about the same time by the same
25 active recruitment techniques.
26 10. In or about 1975, Plaintiffs entered into a five
27 year renewable written Employment Agreement with Defendants, and
28 each of them, whereby Plaintiffs would be paid an unspecified
"allowance," bonuses, and room and board in exchange for an

unspecified number of hours to be worked each day and week for the Church. As a matter of policy, Plaintiffs later learned that their allowance amounted to approximately $17.50 per week and working hours were 9:00 a.m to 12:00 midnight, daily, with one day's leave every two weeks. Even these "privileges," however, were subject to being removed by the Church pursuant to the "Team Member System." Pursuant to the Team Member System, the Church published five classes of laminated cards, each class representing a token to be used as privately-issued money in exchange for food, board, pay, bonuses and liberty. The Team Member System required that the Plaintiffs be given one of each of these cards when the Church administration was satisfied with their work production, and loyalty to the organization. Any dissatisfaction with the work output or "attitude" of Plaintiffs would result in revocation of the tokens, thereby requiring Plaintiffs to work long hours with no days off, no pay, no board (requiring them to sleep outdoors on the ground) and substandard nutrition comprised solely of rice, beans and water. When Plaintiffs had lost all of their cards, as a matter of course, they would be sent to the Rehabilitation Project Force for "attitude adjustment," which was comprised of even harsher labor, deprivation of liberty, and psychological duress forcing the submission of Plaintiffs to the power and control of Defendants, as set out more specifically herein.

11. From the outset, and during the course of their involvement with the Church, Defendants subjected Plaintiffs to psychological trauma, duress and undue influence for the purposes of forcing submission of Plaintiffs to the control of Defendants by means of brainwashing. The purpose of forcing submission of

Plaintiffs and other individuals to the control of Defendants was to create a slave-like work force that would work to the wealth and benefit of Defendants. Once Plaintiffs were placed under the domination of Defendants, Plaintiffs were exploited against their will to work as uncompensated employees of Defendants, and continuously subjected to physical and psychological trauma, indoctrination and exhaustion.

12. For the duration of their affiliation with Defendants, Defendants and each of them employed the following psychological devices, as well as other devices, to cause Plaintiffs to involuntarily abandon their identities, spouses, and loyalties, and deprive Plaintiffs of their independent free will, thereby forcing them to submit to the physical and psychological control of Defendants: Threats of torture; implementation of brainwashing tactics; threats of physical harm for lack of loyalty to Defendants; implementation of an electronic device dubbed the "E Meter" that purportedly measured the degree of Plaintiffs' loyalty to Defendants through electrodes held in Plaintiffs' hands during the course of lengthy interrogations, as described with more particularity herein; sudden involuntary and forceable separation of spouses from one another for many months, and depriving the spouses of communication with one another or allowing them to know where the other was located; willfully and expressly inducing divorce between Plaintiffs; forcibly causing Plaintiffs to work long hours at hard labor in excess of 40 hours a week and eight hours a day without compensation; deliberately inducing fatigue by physical abuse and deprivation of sleep; forcing Plaintiffs to be housed in animal quarters; deliberately confining Plaintiffs to

1 premises under the control of Defendants and under threat of
2 physical harm without allowing Plaintiffs to leave of their own
3 free will; and threatening Plaintiffs that failure to submit to
4 the power and control of Defendants would result in their
5 becoming "fair game," a term of art coined by Defendants,
6 described more clearly herein.

7 13. During the course of their involuntary affiliation
8 with Defendants, Plaintiffs were, on many occasions, subjected to
9 scrutiny regarding their loyalty to Defendants by being placed on
10 the E Meter. The E Meter is an electronic device used by
11 Defendants that measures the emotional responses of employees of
12 Defendants, such as Plaintiffs, through electrodes held in the
13 hands. Plaintiffs would regularly be interrogated for days on
14 end, not being allowed to sleep, regarding their loyalty or lack
15 thereof to Defendants. The E Meter was comprised of a needle
16 that would rise to levels indicating the degree of credibility
17 and loyalty of the interrogated party.

18 14. Defendants, and each of them, have a known policy
19 of "fair game." This policy directs that any individual or
20 employee who expresses a lack of loyalty to Defendants is open to
21 any form of harassment, economic ruin, or subject to any covert
22 plan designed to cause emotional or physical harm, and/or
23 financial ruin. This plan includes the destruction of a person's
24 business, reputation, and/or framing of false charges of criminal
25 acts. Throughout Plaintiffs' involuntary affiliation with
26 Defendants, they were constantly psychologically tormented with
27 threats of becoming "fair game" within the context of the
28 specialized meaning given the term by Defendants.

1 15. During the course of their "employ" with
2 Defendants, Plaintiff VICKI J. AZNARAN (hereinafter "VICKI") was
3 employed in the so-called Commodore's Messenger Organization,
4 executing the directives of L. RON HUBBARD (herein "Hubbard") in
5 a management capacity. RICHARD was assigned to the personal
6 office of Hubbard in the capacity of Public Relations Expert in
7 charge of creating a positive image of Hubbard among staff and
8 the public.
9 16. In or about 1981, VICKI was ordered to Los Angeles
10 where she was employed as a "missionaire" to purge members of
11 Defendants' organization who had been subjected to civil and
12 criminal prosecution, remove assets of Defendant CHURCH OF
13 SCIENTOLOGY OF CALIFORNIA to overseas trusts where they could not
14 be accessed by plaintiffs or the government, and set up sham
15 corporate structures to evade prosecution generally. RICHARD was
16 sent with VICKI in the capacity of a security investigator who
17 surveilled members of the organizations associated with
18 Defendants for the purposes of determining their loyalty and
19 likelihood that they would testify against Defendants in pending
20 civil and criminal suits, as well as designated "enemies" of the
21 Church. In or about December of 1981, VICKI and RICHARD were
22 ordered to the Religious Technology Center controlled and
23 operated by Defendant RELIGIOUS TECHNOLOGY CENTER, INC., at
24 Gilman Hot Springs, near Hemet, California. VICKI was assigned
25 to work for Defendant AUTHOR SERVICES, INC., in managing the
26 sales of copyright of the book, Dianetics, written by Hubbard.
27 She was also commissioned to reorganize corporate structures and
28 effect sham sales of millions of copies of Dianetics to the
corporate Defendants named herein as a vehicle for transferring

1 assets among them. RICHARD was assigned to supervise the
2 construction of a home for Hubbard with the assistance of some
3 120 other "members" of the various organizations of Defendants.
4 Plaintiffs were assigned to these positions by Defendant DAVID
5 MISCAVIGE (herein "MISCAVIGE") who was operating under
6 instructions of Ann and Patrick Broeker, personal confidants of
7 Hubbard.

8 17. In or about March of 1982, Defendant MISCAVIGE
9 became dissatisfied with the speed at which RICHARD was
10 completing the construction project, and imposed the Team Member
11 System, thereby depriving RICHARD of all of his cards, and
12 thereby forcing RICHARD to work without pay from 9:00 a.m. to
13 12:00 p.m., without any days off, to sleep outdoors, and to eat
14 only rice and beans. Ultimately, RICHARD was punished by being
15 assigned to the Rehabilitation Project Force in Los Angeles where
16 he was made a member of a construction crew working on the
17 renovation of buildings owned and operated by Defendants on the
18 corner of Vermont and Sunset, known as the Cedars of Lebanon
19 Buildings. RICHARD was forced to work long hours again, from
20 9:00 a.m until 12:00 midnight without any days off at a rate of
21 pay of $1.25 per week. He was forced to work in this position
22 for 99 days. During the course of his incarceration on the
23 Rehabilitation Project Force, VICKI remained in Hemet where she
24 worked directly for Ann Broeker. Both VICKI and RICHARD were
25 deprived of the right of meeting with each other; nevertheless,
26 VICKI surreptitiously drove to Los Angeles to meet with RICHARD
27 late Friday nights. Both VICKI and RICHARD had been told that if
28 they had been caught meeting or communicating with each other,
they would become "fair game." Finally, on or around

Thanksgiving of 1982, RICHARD was deemed "rehabilitated" and returned to the Religious Technology Center in Hemet where he installed a security system around the Hubbard residence, and continued to work in the capacity of security specialist for Defendants.

18. In or about October of 1982, Defendants, and each of them, resolved to restructure their corporate and financial relationships at a meeting in San Francisco, which restructuring called for all Scientology entities to turn over their profits to Defendant AUTHOR SERVICES, INC. VICKI expressed disapproval of the proposal and was summarily ordered to the Rehabilitation Project Force in Hemet where, for approximately 120 days, was forced to participate in the "running program." The running program required VICKI and other persons subjected to the control of Defendants to run around an orange telephone pole from 7:00 a.m. until 9:30 p.m. in the evening, with 10 minute rests every one-half hour, and 30 minute breaks for lunch and dinner. In or about May of 1983, VICKI was deemed rehabilitated and ordered back to the Religious Technology Center at Gilman Hot Springs. From mid 1983 until the death of Hubbard on January 24, 1986, VICKI and RICHARD remained in their respective work capacities at Gilman Hot Springs continually undergoing physical trauma and indoctrination by use of the techniques already described hereinabove.

19. On or about January 24, 1986, RICHARD was ordered to the San Louis Obispo ranch of Hubbard where he was forced to work in the capacity of a security guard for a year and a half. During this time, Defendants, and each of them, continued to force him to work the hours of 9:00 a.m until 12:00 midnight,

with the possibility of having one day off every two weeks, at minimum wage. RICHARD was forced to falsify time cards to falsely indicate that he had been working 40 hour work weeks, so as to avoid an obligation on the part of Defendants from paying him overtime. During his stay at the ranch in San Louis Obispo, RICHARD was forced to sleep in a horse stable with several of the other indoctrinated employees of Defendants. During the course of RICHARD's stay at the ranch, VICKI was not told of his whereabouts, nor were Plaintiffs permitted to correspond with each other.

20. In or about February of 1987, a schism arose between Defendant MISCAVIGE and the Broekers, each of whom claimed to possess the "upper level Holy Scriptures" written by Hubbard, which scriptures Hubbard had intended to bequeath to the Church. VICKI became increasingly demanding of Defendant MISCAVIGE to be put in contact with RICHARD, and Defendant MISCAVIGE regarded her demands as an expression of allegiance to MISCAVIGE's new religious rival, the Broekers. MISCAVIGE therefore ordered VICKI to the Rehabilitation Project Force at "Happy Valley," a secret location bordering the Sobova Indian Reservation near Gilman Hot Springs, California, overseen and controlled by Defendant NORMAN STARKEY.

21. Plaintiff VICKI understood that the consequences of the lack of cooperation was a threat of "fair game," and that Defendants, and each of them, would make efforts to sever her relationship entirely with her husband, as Defendants had done to others. VICKI was further advised that if she went to the Rehabilitation Project Force camp in Happy Valley cooperatively, she would be able to see RICHARD within a few days. This

representation was false when made. In fact, Defendants concealed the true intent which was to keep VICKI totally separated from her husband and deny her access to him.

22. Once having arrived at Happy Valley, VICKI was assigned a guard and was not allowed to go anywhere or do anything without her guard being present. At night, she was imprisoned by having heavy furniture moved to secure the exit, keeping her from in any way escaping. Further, Defendants kept, and continue to keep all of her physical belongings including a horse and two dogs.

23. VICKI was in fear of being physically prevented from leaving, or subject to "fair game" if she escaped. Plaintiff had seen in the past other victims of Happy Valley be beaten upon attempted escape, and their personal belongings destroyed. During this period of unlawful detention, VICKI was unable to communicate with RICHARD as their correspondence was intercepted and denied. During this period of false imprisonment, VICKI and others were made to wear rags taken out of garbage cans, sleep on the ground, dig ditches, subjected to many hours of indoctrination using the techniques hereinabove, all designed to coercively force VICKI to submit to the control of Defendants. During the time of her incarceration in Happy Valley, Defendants DAVID MISCAVIGE and NORMAN STARKEY were directing and enforcing the coercive and abusive indoctrination devices at Happy Valley.

24. On or about April 9, 1987 VICKI and two other victims escaped from Happy Valley onto the Sobova Indian Reservation where they were pursued on motorcycles by guards of Happy Valley. VICKI and the other victims were rescued by

residents of the reservation who picked them up in a pick-up truck and spirited them to a motel in the City of Hemet.

25. As these events were transpiring, RICHARD, still at the ranch in San Louis Obispo, was repeatedly urged that VICKI had become disloyal to Defendants, and that RICHARD should divorce her.

26. RICHARD demanded to see VICKI and was permitted to go to Hemet where Plaintiffs were reunited. Fearful of reprisals and becoming "fair game," however, Plaintiffs did not at that time sever their relationships altogether with Defendants. Plaintiffs therefore left the State of California to Dallas, Texas where they set up a private investigation business, remaining in contact and under the control of Defendants.

27. Because Defendants regarded Plaintiffs departure to Texas as a breach of their five year commitment with Plaintiffs, Defendants submitted a bill for services allegedly rendered to Plaintiffs entitled "freeloader bill" in the amount of $59,048.02. This bill purports to indicate all of the expenses incurred by Defendants in indoctrination activities imposed upon Plaintiffs. That is, Defendants attempted to charge money to Plaintiffs for each session in which the E Meter was used, **all** indoctrination sessions, and time spent on the Rehabilitation Project Force. These services are dubbed "courses" and "auditing sessions." Plaintiffs have been required to make payments on this fictitious bill in order to escape becoming "fair game."

28. As a result of the psychological trauma nd indoctrination techniques applied by Defendants, and each of them, Plaintiffs were unable to comprehend their legal rights

1 with regard to the actions of Defendants, and were not
2 sufficiently conscious of the nature and effect of the acts of
3 Defendants so as to be able to take legal action or hire an
4 attorney until on or about January 1, 1988. Plaintiffs continued
5 to submit to the demands and requests of Defendants, and remained
6 subjected to psychological trauma imposed by Plaintiffs until on
7 or about January 1, 1988, when they resolved to seek legal
8 assistance.

9 FIRST CAUSE OF ACTION
(False Imprisonment)

10 29. Plaintiffs repeat, reallege and incorporate herein
11 by reference each of the allegations contained in Paragraphs 2
12 through 28, inclusive, of the Common Allegations as though set
13 forth in full below.

14 30. In or about February, 1987, Defendants, and each
15 of them, physically seized Plaintiff VICKI AZNARAN ("VICKI") and
16 forcibly, against her will, and without her consent and over her
17 protest, placed VICKI in the confines of a so-called
18 Rehabilitation Project Force Camp at Happy Valley, California,
19 near the Sobova Indian Reservation, Riverside County. During
20 this time, Defendants, and each of them, employed coercive
21 indoctrination tactics more fully described in Common Allegations
22 above, warned her that she would be "Fair Game," and made
23 representations that they would work to severe her marriage with
24 her husband, Plaintiff RICHARD AZNARAN. Plaintiff VICKI was in
25 fear of being physically beaten, and was under constant guard at
26 all times. During this period of false imprisonment, Plaintiff
27 VICKI and other inmates were made to wear rags taken out of
28 garbage cans, sleep on the ground, dig ditches, and were

subjected to numerous hours of indoctrination, all designed to coercively force VICKI to submit to the control of Defendants. On or about April 9, 1987, VICKI was successful in escaping from Happy Valley.

31. In employing these coercive and threatening tactics during the course of imprisonment more fully described in Common Allegations, above, Defendants, and each of them, acted with deliberate malice for the purpose of forcing submission of Plaintiff VICKI to their control, so that she would remain in their employ for no consideration whatsoever, under circumstances that can only be described as involuntary servitude.

32. As a proximate result of the acts of Defendants set out herein, and in the Common Allegations, above, Plaintiff VICKI was injured in her health, strength, and activity, sustaining injury to her body and shock and injury to her nervous system and person, all of which injuries have caused VICKI to suffer extreme and severe physical pain and mental anguish. These injuries have resulted in, and will continue to result in, some permanent disability to Plaintiff VICKI, and Plaintiff VICKI has been damaged in an amount according to proof at trial.

33. Defendants, and each of them, engaged in the false imprisonment of Plaintiff VICKI as herein alleged, and were willful, wanton, despicable, malicious, and oppressive, and their acts justify the awarding of punitive damages, and Plaintiff VICKI is entitled to and hereby demands from Defendants, and each of them, punitive damages in an amount not less than Ten Million Dollars ($10,000,000.00).

SECOND CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

34. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Cause of Action, as though set forth in full below.

35. Defendants, and each of them, represented to Plaintiffs and others, that they were rendering services of a spiritual and psychological nature that would make Plaintiffs better persons. These representations included statements that Scientology would scientifically improve Plaintiffs' well being and make them physiologically better persons. These representations were false when made by Defendants, and each of them, and known to be false when made. Based on the relationship of trust developed between Plaintiffs and Defendants, Defendants, and each of them, were fully aware of the particular susceptibility of Plaintiffs' to emotional distress imposed by them.

36. Defendants' conduct, as set out in the Common Allegations, above, was intentional and malicious and done for the purpose of causing Plaintiffs to suffer humiliation, mental anguish, and emotional and physical distress. The conduct of Defendants in confirming and ratifying that conduct was done with the knowledge that Plaintiffs' emotional and physical distress would thereby increase upon application of the indoctrination techniques used by Plaintiffs more fully set out in the Common Allegations, above, including, but not limited to, causing Plaintiffs to be separated for many months without knowing where

1 the other was located. Such conduct was done with a wanton and
2 reckless disregard of the consequences to Plaintiffs.
3 37. As the proximate result of the aforementioned
4 acts, Plaintiffs suffered humiliation, mental anguish, and
5 emotional and physical distress, and have been injured in mind
6 and body in an amount according to proof at trial.
7 38. The aforementioned acts of Defendants were
8 willful, wanton, despicable, malicious, and oppressive, and
9 justify the awarding of exemplary and punitive damages in an
10 amount not less than Ten Million Dollars ($10,000,000.00).

THIRD CAUSE OF ACTION
11 (Negligent Infliction of Emotional Distress)

12 39. Plaintiffs repeat, reallege and incorporate herein
13 by reference each of the allegations contained in Paragraphs 2
14 through 28, inclusive, of the Common Allegations, and Paragraphs
15 29 through 33, inclusive, of the First Cause of Action, and
16 Paragraphs 34 through 38, inclusive, of the Second Cause of
17 Action as though set forth in full below.
18 40. From the period of 1973 until 1988, Defendants,
19 and each of them, represented to Plaintiffs and others, that they
20 were rendering services of a spiritual and physiological nature
21 that would make Plaintiffs better persons. These representations
22 included statements that Scientology technology would
23 scientifically improve Plaintiffs' well being and make them
24 psychologically better persons.
25 41. During the course of their affiliation with
26 Plaintiffs, Defendants, and each of them, engaged in the conduct
27 more fully described hereinabove in the Common Allegations.
28 42. As a proximate result of the negligence and
carelessness of Defendants, and each of them, Plaintiffs suffered

1 serious mental anguish and emotional distress and have been
2 injured all to Plaintiffs' damage in an amount to be determined
3 according to proof at trial.

4 FOURTH CAUSE OF ACTION
(Loss of Consortium)

5 43. Plaintiffs repeat, reallege and incorporate herein
6 by reference each of the allegations contained in Paragraphs 2
7 through 28, inclusive, of the Common Allegations, Paragraphs 29
8 through 33, inclusive, of the First Cause of Action, Paragraphs
9 34 through 38, inclusive, of the Second Cause of Action, and of
10 Paragraphs 49 through 42, inclusive, of the Third Cause of
11 Action, as though set forth in full below.

12 44. As a consequence of the conduct of Defendants, and
13 each of them, set out more fully above in the Common Allegations,
14 Plaintiffs were unwillfully separated from each other for long
15 periods of time and were deprived of their right as husband and
16 wife to remain together and in communication.

17 45. Prior to the conduct of Defendants, and each of
18 them, more fully set out in the Common Allegations above, each of
19 Plaintiffs was able to, and did perform his or her duties as a
20 husband or wife. Subsequent to the conduct of Defendants, and as
21 a proximate result thereof, Plaintiffs were unable to perform
22 their necessary duties as spouses to each other, and each was
23 unable to perform their work, services, and duties. By reason
24 thereof, Plaintiffs were deprived of each other's consortium, all
25 to Plaintiffs' damage in an amount according to proof at trial.

26 46. Defendants, and each of them, engaged in said
27 conduct, with the specific intent to injure Plaintiffs, which
28 constitutes oppression, malice, despicable conduct, and a
conscious disregard for the Plaintiffs' rights and, therefore,

Plaintiffs are entitled to and hereby demand from Defendants, and each of them, punitive damages in an amount not less than Ten Million Dollars ($10,000,000.00).

FIFTH CAUSE OF ACTION
(Conspiracy)

47. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Cause of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action as though set forth in full below.

48. During the course of Plaintiffs' affiliation with Defendants, Defendants, and each of them, knowing and willfully conspired, and agreed among themselves, to engage in the tortious activities and wrongful schemes set out in the Common Allegations, above.

49. Defendants, and each of them, did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and above-alleged agreement.

50. Defendants, and each of them, furthered the conspiracy by cooperating with each other and/or lending aide and encouragement to, and/or ratifying and adopting the acts of each other in perpetrating the conspiracy herein alleged.

51. As a proximate result of the wrongful acts herein alleged, Plaintiffs have been generally damaged in an amount to be determined according to proof at trial.

52. Defendants, and each of them, did the things herein alleged maliciously and to oppress Plaintiff, and

constitute despicable conduct. Plaintiff is therefore entitled to exemplary or punitive damages in a sum of not less than Ten Million Dollars ($10,000,000.00).

SIXTH CAUSE OF ACTION
(Fraud)

53. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33 inclusive, of the First Cause of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action as though set forth in full below.

54. Defendants, and each of them, represented to the Plaintiffs and others, that they were rendering services of a spiritual and psychological nature that would make Plaintiffs better persons. These representations included statements that Scientology technology would scientifically improve Plaintiffs' well being and make them psychologically better people. These representations were false when made by Defendants, and each of them, and known to be false when made.

55. Defendants, and each of them, knew that the practices of the so-called Church of Scientology, its affiliates, and Defendants named herein, were not designed to increase the well being of any of its victims, but where made to coercively persuade each and every follower to dedicate their lives to Defendants in order for Defendants to increase their wealth derived from an overall scheme to make money founded on the exploitation of free labor. Pursuant thereto, Defendants, and

1 each of them, required Plaintiffs to participate in crimes
2 against the United States Government, including the obstruction
3 of justice and efforts to create corporate structures designed to
4 keep payments from properly being paid to the Internal Revenue
5 Service.

6 56. Pursuant to the fraudulent scheme described
7 herein, Plaintiffs were, subjected to humiliation, degradation,
8 physical labor, and imprisonment, all designed to break down
9 their will and free thinking, and convert them into submissive,
10 frightened and dedicated followers of Defendants.

11 57. In submitting to Defendants' programs, Plaintiffs
12 reasonably relied upon the representations of Defendants, and
13 each of them, and if they had known the truth, Plaintiffs would
14 not have submitted. As a result of said fraudulent conduct,
15 Defendants lost 15 years of their lives, suffered emotional
16 distress and psychological injury, and were deprived of some 15
17 years of salary.

18 58. As a proximate result of the wrongful acts herein
19 alleged, Plaintiffs have been damaged in an amount to be
20 determined according to proof at trial.

21 59. Defendants, and each of them, engaged in said
22 fraudulent activity with the specific intent to injure
23 Plaintiffs, which constitutes oppression, despicable conduct,
24 malice and a conscious disregard for Plaintiffs' rights and,
25 therefore, Plaintiffs are entitled to and hereby demand from
26 Defendants, and each of them, punitive damages in an amount not
less than Ten Million Dollars ($10,000,000.00).

27

28

SEVENTH CAUSE OF ACTION
(Breach of Contract)

60. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Causes of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, and Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action, and Paragraphs 53 through 59, inclusive, of the Sixth Cause of Action as though set forth in full below.

61. Commencing in or about 1972, Plaintiffs entered into oral and written agreements with Plaintiffs wherein Defendants, and each of them, promised to provide spiritual and psychological services to Plaintiffs. In return, Plaintiffs would work and serve Defendants, and each of them.

62. Defendants, and each of them, breached the said agreements by not providing any spiritual or psychological services, but rather, providing indoctrination, psychological coercion, duress and stress, all designed to break Plaintiffs' will so that they would remain compliant servants to Defendants for the remainder of their lives, and to the use of Defendants in furtherance of illegal conduct and money making schemes. As the result of said breach of agreement as set out both herein and in the Common Allegations, above, Plaintiffs have lost the value of the reasonable services rendered to Defendants, and each of them, during their 15 year affiliation with Defendants. Further, Plaintiffs have lost 15 years of their lives that would have

otherwise been spent developing careers and financial security for themselves.

63. As a proximate result of the breach of the agreement described herein, and in the Common Allegations above, Plaintiffs have been damaged in an amount according to proof at trial.

EIGHTH CAUSE OF ACTION
(Restitution)

64. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Causes of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, and Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action, and Paragraphs 53 through 59, inclusive, of the Sixth Cause of Action, and Paragraphs 60 through 63, inclusive, of the Seventh Cause of Action as though set forth in full below.

65. Defendants, and each of them, publicly advocate that any person who takes Scientology courses and becomes dissatisfied with the same, is entitled to a refund of the financial compensation paid for the same.

66. This representation by Defendants, and each of them, is part of the agreement between Plaintiffs and Defendants for Scientology technology services Plaintiffs have received. Pursuant to said agreement, Plaintiffs have, and are hereby making, demand upon Defendants, and each of them, for the return of the financial compensation paid for such training and courses.

67. Defendants, and each of them, have placed a monetary value of the services rendered by Defendants, and each of them, at Fifty-Nine Thousand Forty Eight Dollars and Forty Cents ($59,048.40).

68. Plaintiffs, through their labor, have paid the full amount of said monetary value of services and therefore demand return of this sum from Defendants, and each of them, to Plaintiffs.

69. Furthermore, Plaintiffs demand the reasonable value of the services they have rendered to Defendants, and each of them, over the period of 1972 to 1988, more fully described in the common allegations, above, in an amount according to proof at trial.

NINTH CAUSE OF ACTION
(Invasion of Privacy)

70. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Causes of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, and Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action, and Paragraphs 53 through 59, inclusive, of the Sixth Cause of Action, and Paragraphs 60 through 63, inclusive, of the Seventh Cause of Action, and Paragraphs 64 through 69, inclusive of the Eighth Cause of Action as though set forth in full below.

71. Pursuant to the promises of Defendants, and all of them, regarding spiritual and psychological counseling,

Plaintiffs were forced to participate in "counseling sessions" in which they were forced to reveal that their inner-most private thoughts and feelings. Defendants, and each of them, represented to Plaintiffs that all such information received from the so-called "auditing" sessions employing the use of various psychological techniques, including, but not limited to, the use of the E-Meter described in the Common Allegations above, would be held in confidence and would never be disclosed or put to any use. Said information was of no legitimate public concern. Pursuant to these representations and promises, Plaintiffs participated in the "auditing sessions" and discussed and disclosed their inner-most private thoughts.

72. In April, 1987, and prior to April 9, 1987, Defendants, and each of them, read the private file of Plaintiff VICKI J. AZNARAN containing said private information from VICKI's auditing sessions.

73. Defendants, and each of them, demanded that VICKI then publicly disclose and give further details concerning further events they had learned from said file concerning various other victims of Defendants. VICKI was advised, warned and threatened that if she did not give further details, Defendants, and each of them, would "get it out of you one way or another."

74. As a result of this violation of privacy, VICKI has been humiliated, distraught, and suffered emotional distress, damaging her in an amount according to proof at trial.

75. Defendants, and each of them, engaged in said invasion of privacy with the specific intent to injure Plaintiff, which constitutes despicable conduct, oppression, malice and conscious disregard for Plaintiff's rights and, therefore,

Plaintiff is entitled to and hereby demands from Defendants, and each of them, punitive damages in and amount not less than Ten Million Dollars ($10,000,000.00).

TENTH CAUSE OF ACTION
(Breach of Statutory Duty to Pay Minimum Wages and Overtime)

76. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Causes of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, and Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action, and Paragraphs 53 through 59, inclusive, of the Sixth Cause of Action, and Paragraphs 60 through 63, inclusive, of the Seventh Cause of Action, Paragraphs 64 through 69, inclusive of the Eighth Cause of Action, and Paragraphs 70 through 75, inclusive of the Ninth Cause of Action as though set forth in full below..

77. During the period from in or about June, 1973, to in or about April, 1987, inclusive, Plaintiffs worked for Defendants, and each of them, for a total of 9,764 man hours, 5,648 of which represent regular working hours, and 4,116 hours of which represent overtime hours.

78. Plaintiffs are therefore entitled to an amount representing minimum wage for the regular hours worked as well as overtime pay for overtime hours, pursuant to California Labor Code §1194, in an amount according to proof at trial.

79. Plaintiffs are also entitled to reasonable attorneys' fees in an amount according to proof at trial, pursuant to §218.5 of the California Labor Code.

ELEVENTH CAUSE OF ACTION
(Constructive Fraud)

80. Plaintiffs repeat, reallege and incorporate herein by reference each of the allegations contained in Paragraphs 2 through 28, inclusive, of the Common Allegations, Paragraphs 29 through 33, inclusive, of the First Causes of Action, Paragraphs 34 through 38, inclusive, of the Second Cause of Action, Paragraphs 39 through 42, inclusive, of the Third Cause of Action, and Paragraphs 43 through 46, inclusive, of the Fourth Cause of Action, and Paragraphs 47 through 52, inclusive, of the Fifth Cause of Action, and Paragraphs 53 through 59, inclusive, of the Sixth Cause of Action, and Paragraphs 60 through 63, inclusive, of the Seventh Cause of Action, Paragraphs 64 through 69, inclusive of the Eighth Cause of Action, Paragraphs 70 through 75, inclusive of the Ninth Cause of Action, and Paragraphs 76 through 79, inclusive of the Tenth Cause of Action as though set forth in full below.

81. Defendants, and each of them, represented to the Plaintiffs and others, that they were rendering services of a spiritual and psychological nature that would make Plaintiffs better persons. These representations included statements that Scientology technology would scientifically improve Plaintiffs' well being and make them psychologically better people. These representations were false when made by Defendants, and each of them, and known to be false when made.

82. As a consequence of the false representations made by Defendants, and each of them to Plaintiffs, Plaintiffs and

Defendants developed a relationship of trust elevating Defendants to the role of fiduciaries of Plaintiffs.

83. In submitting to Defendants' programs, Plaintiffs relied upon the representations of Defendants, and each of them, and if they had known the truth, Plaintiffs would not have so submitted. As a result of said fraudulent conduct, Defendants continued to submit to demands of Plaintiffs to their detriment, from the period in or about 1973 until on or about January 1, 1988.

84. As a proximate result of the wrongful acts herein alleged, Plaintiffs have been damaged in an amount to be determined according to proof at trial.

85. Defendants, and each of them, engaged in said fraudulent activity with the specific intent to injure Plaintiffs, which constitutes oppression, malice and a conscious disregard for Plaintiffs' rights and, therefore, Plaintiffs are entitled to and hereby demand from Defendants, and each of them, punitive damages in an amount not less than Ten Million Dollars ($10,000,000.00).

WHEREFORE, Plaintiffs pray for judgment as follows:

As to the First Cause of Action:

1. For general and special damages according to proof at trial; and

2. For punitive damages from Defendants, and each of them, in an amount not less than Ten Million Dollars ($10,000,000.00);

As to the Second Cause of Action:

1. For general and special damages according to proof at trial; and

2. For punitive damages from Defendants, and each of them, in an amount not less than Ten Million Dollars ($10,000,000.00);

As to the Third Cause of Action:

1. For general and special damages according to proof at trial;

As to the Fourth Cause of Action:

1. For general and special damages according to proof at trial; and

2. For punitive damages from Defendants, and each of them, in an amount not less than Ten Million Dollars ($10,000,000.00);

As to the Fifth Cause of Action:

1. For general and special damages according to proof at trial; and

2. For punitive damages from Defendants, and each of them, in the amount of Ten Million Dollars ($10,000,000.00);

As to the Sixth Cause of Action:

1. For general and special damages according to proof at trial;

2. For punitive damages in an amount of not less than Ten Million Dollars ($10,000,000.00);

As to the Seventh Cause of Action:

1. For general and special damages according to proof at trial; and

As to the Eighth Cause of Action:

1. For general damages according to proof at trial; and

2. For special damages i the amount of $59,048.40.

<u>As to the Ninth Cause of Action</u>:

1. For general and special damages according to proof at trial; and

2. For punitive damages in an amount of not less than Ten Million Dollars ($10,000,000.00); and

<u>As to the Tenth Cause of Action</u>:

1. For general and special damages according to proof at trial; and

2. Reasonable attorneys' fees according to proof at trial.

<u>As to the Eleventh Cause of Action</u>:

1. For general and special damages according to proof at trial; and

2. For punitive damages in an amount of not less than Ten Million Dollars ($10,000,000.00).

<u>As to all Causes of Action</u>:

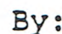
1. For cost of suit incurred herein;

2. For attorneys' fees incurred; and

3. For such other and further relief and the court may deem just and proper.

Dated: April 1, 1988

CUMMINS & WHITE

By: 

SHELLEY M. LIBERTO
Attorneys for Plaintiffs
VICKI J. AZNARAN and
RICHARD N. AZNARAN

act procompetitively after the acquisition is consummated. Finally, the FTC showed that the equities favor issuing this injunction. Therefore, we VACATE the district court's order denying the FTC's request for a preliminary injunction and REMAND the case, directing the district court to issue the preliminary injunction.

IT IS SO ORDERED.

Margery WAKEFIELD, Plaintiff,

v.

The CHURCH OF SCIENTOLOGY OF CALIFORNIA, Defendant-Appellee,

Times Publishing Company and Tribune Company, Appellants.

No. 89-3796.

United States Court of Appeals, Eleventh Circuit.

Aug. 12, 1991.

Religious organization sought orders to show cause why plaintiff, which had brought suit against organization, should not be held in civil and criminal contempt for violating confidentiality requirement of settlement agreement. Newspapers' motions for access to contempt hearings and related pleadings, proceedings, and records, to determine if their reporters' qualified privilege prevented them from being compelled to testify, was denied by the United States District Court for the Middle District of Florida, No. 82-1313-CIV-T-10, Elizabeth A. Kovachevich, J., and newspapers appealed. The Court of Appeals, Hatchett, Circuit Judge, held that newspapers' appeal from order denying them access to contempt hearings did not fall within capable of repetition, yet evading review exception to mootness doctrine.

Case dismissed.

1. Federal Courts ⚷724

Newspapers' appeal from order denying newspapers' motions for access to evidentiary hearing at which hearing newspaper reporters had been subpoenaed did not satisfy requirements for capable of repetition, yet evading review exception to mootness doctrine after hearing was held; and newspaper which had reported on case did not seek to intervene until two years after closure, and case involved unique circumstances, such as plaintiff's "constant disregard and misuse of the judicial process," on which closure order was based. U.S.C.A. Const.Amend. 1.

2. Federal Courts ⚷614

Parties may make alternative claims, change claims, or sometimes file inconsistent claims, but may not do so in appellate court; Court of Appeals reviews case tried in district court and does not try ever-changing theories parties fashion during appellate process.

3. Federal Courts ⚷723

When addressing mootness, Court of Appeals determines whether judicial activity remains necessary.

4. Federal Courts ⚷723

Three exceptions to mootness doctrine exist: issues are capable of repetition yet evading review; appellant has taken all steps necessary to perfect appeal and to preserve status quo; and trial court's order will have possible collateral legal consequences.

5. Federal Courts ⚷723

Capable of repetition, yet evading review exception to mootness doctrine applies if challenged action is of too short a duration to be fully litigated prior to its cessation, and reasonable expectation exists that same complaining party will be subject to same action again.

6. Federal Courts ⚷723

Mere hypothesis or theoretical possibility is insufficient to satisfy test for capable of repetition, yet evading review exception to mootness doctrine.

Patricia F. Anderson, St. Petersburg, Fla., for appellants.

Michael Lee Hertzberg, New York City, for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and COX Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

We dismiss this case, which at one time touched upon important first amendment issues, because the case has been rendered moot.

FACTS

Margery Wakefield and three other plaintiffs alleged that the Church of Scientology of California (the Church) committed various wrongful acts against them. On August 14, 1986, Wakefield, the other plaintiffs, and the Church entered into a settlement agreement which included provisions enjoining Wakefield and the other plaintiffs from discussing, with other than immediate family members, (1) the substance of their complaints against the Church, (2) the substance of their claims against the Church, (3) alleged wrongs the Church committed, and (4) the contents of documents returned to the Church. The district court approved the settlement agreement, sealed the court files, and dismissed the case with prejudice. The dismissal order specifically gave the court jurisdiction to enforce the settlement terms. Nonetheless, Wakefield publicly violated the settlement agreement's confidentiality provisions.

In 1987, both the Church and Wakefield filed motions to enforce the settlement agreement. The district court requested that a magistrate judge address whether either party had violated the settlement agreement. On September 9, 1988, the magistrate judge issued a report and recommendation which concluded that Wakefield had violated the settlement agreement, and the Church had fully complied with the agreement's terms and conditions. On November 3, 1988, the Times Publishing Company (the Times), which publishes the *St. Petersburg Times*, moved to intervene in this lawsuit, to unseal the court files, and to gain access to any contempt hearings. In its motions, the Times alleged that the sealed court records and closed proceedings violated its and the public's constitutional and common law rights of access to judicial proceedings and records. In opposing the motions, the Church argued that they were untimely and barred by laches. On May 16, 1989, the district court adopted the magistrate judge's report, issued a preliminary and permanent injunction against Wakefield, and referred the Times's motion to intervene to the magistrate judge.

Notwithstanding the court's injunction, Wakefield continued to publicize the lawsuit. Thus, on July 18, 1989, the Church sought orders to show cause why Wakefield should not be held in civil and criminal contempt. The Church also sought damages, costs, and attorney's fees. To support its requests, the Church submitted excerpts of newspaper, television, and radio interviews attributed to Wakefield.

On August 15, 1989, the magistrate judge submitted a report and recommendation addressing Times's motion to intervene. He recommended that absent a compelling reason, all future proceedings and the court files, except for documents pertaining to the settlement, should be open and that Times be allowed to intervene. Due to events discussed later in this opinion, the district court has not issued a final order on these issues.

The district court scheduled an evidentiary hearing to address the Church's contempt motion. As witnesses at the hearing, the Church subpoenaed reporters for the *St. Petersburg Times* and the *Tampa Tribune*. Consequently, the Times, and the Tribune Company, which publishes the *Tampa Tribune* (the newspapers), filed motions for access to hearings, pleadings, proceedings, and records related to the contempt hearings in order to determine if

their reporters' qualified privilege prevented them from being compelled to testify.

PROCEDURAL HISTORY

On September 11, 1989, the district court held an *in camera* proceeding to rule on the newspapers' motions. The district court denied the newspapers' motions for access to the hearings because the Church subpoenaed the reporters only to establish the source and accuracy of the statements attributed to Wakefield. The district court also held that the reporters waived any privilege by publicly attributing the statements to Wakefield.

In considering the newspapers' motions, the district court stated, "due to the plaintiff's complete and utter disregard of prior orders of this court, the court concludes that any restriction short of complete closure would be ineffective." It further held that "[p]ublicity of a private crusade has become her end, not the fair adjudication of the parties' dispute. In doing so, plaintiff is stealing the court's resources from other meritorious cases." Thus, the district court closed the contempt proceedings to the public and the press referring further proceedings to a United States Magistrate Judge. The magistrate judge began contempt hearings on September 11, 1989.

On September 18, 1989, the newspapers filed a Notice of Appeal, a Motion for Expedited Appeal, and a Motion for Stay Pending Appeal. On September 29, 1989, this court granted expedited appeal, but denied the newspapers' emergency motion for a stay of the contempt proceedings pending resolution of the expedited appeal.

On appeal, the newspapers argued that the closure violated their first amendment and common law rights of access to judicial proceedings. They contended that the public's right of access outweighs the rationale for keeping the settlement agreement confidential. The Church contended that Wakefield's "open and defiant contumacious conduct" mandated closure and that the newspapers did not enjoy an absolute constitutional or common law right of access to civil proceedings.

During our first oral argument, we learned that the newspapers had never requested the district court to allow access to the contempt hearing transcripts. Since the hearings had been completed before oral argument, we issued a November 17, 1989, order which temporarily remanded the case to the district court for the limited purpose of allowing the newspapers to seek access to the contempt hearing transcripts. The order further instructed the district court to rule on such a request "within a reasonable time."

On June 25, 1990, eight months after the last contempt hearing, the magistrate judge submitted a report and recommendation which concluded that Wakefield had willfully violated the court's injunction. He further held that while a civil contempt finding could be appropriate, he suggested the case be referred to the United States Attorney's office for prosecution on the criminal contempt charges. The district court has not issued a final order addressing whether Wakefield is in civil or criminal contempt.

Furthermore, almost a year after our temporary remand, the district court had not ruled on the newspapers' requests for access to the contempt hearing transcripts. Thus, the newspapers filed a motion requesting that this court clarify the "reasonable time" language in the November 17, 1989, order. In order to speed finalization of this matter, this court denied the clarification motion, but issued an order stating, "[a]fter December 3, 1990, this court will entertain a request for relief addressing the delay that has occurred since our remand to the district court provided that relief has been sought." After this clear signal for action, the district court issued a November 21, 1990, order unsealing the civil contempt proceeding transcripts, except for those portions which disclosed the settlement agreement terms.

On March 21, 1991, the newspapers filed a motion requesting a second oral argument, which the Church opposed. On April 18, 1991, we granted the newspapers' motions for a second oral argument, instructing the parties to address (1) whether the

case was moot, (2) whether a case or controversy remained, and (3) whether a reasonable possibility of settlement existed.

ISSUE

The sole issue we discuss is whether this case is moot.

CONTENTIONS

The newspapers argue that this case is not moot because the court can grant relief which will affect the parties by ordering release of all the judicial documents relating to the contempt hearing and the unreleased transcript pages.

The Church contends that this case is moot and does not present a case or controversy which this court may address. It emphasizes that the newspapers initially sought access to the proceedings to represent their reporters, then under subpoena. It argues that this aspect of the case is absolutely moot because the Church released the reporters from their subpoenas.

DISCUSSION

[1, 2] This case, at its beginning, presented an interesting and important issue: under what circumstances may civil judicial proceedings be closed to the public and the press? Unfortunately, the newspapers did not prevail in their efforts to halt the proceedings; this court denied their motions to stay the proceedings pending the expedited appeal. The newspapers argue that we should address whether a constitutional right of access to civil proceedings exists. To do so, however, would constitute an advisory opinion. The hearing that is the subject of this case terminated almost two years ago. Although the newspapers have an interest in the constitutional question, perhaps for future cases, no "live" case or controversy remains in this case. The hearings have been completed, and the newspapers have been given the hearing transcripts.[1]

[3] When addressing mootness, we determine whether judicial activity remains necessary. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 n. 10 (1975). "A case becomes moot, and therefore, nonjusticiable, as involving a case or controversy, 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *B & B Chemical Co. v. United States E.P.A.*, 806 F.2d 987, 989 (11th Cir.1986) (quoting *United States v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980)).

[4] Three exceptions to the mootness doctrine exist: (1) the issues are capable of repetition, yet evading review; (2) an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo; and (3) the trial court's order will have possible collateral legal consequences. *B & B Chemical Co.*, 806 F.2d at 990.

The newspapers argue that this case falls within the "capable of repetition yet evading review" mootness exception. They argue that a case is not moot if this court can grant relief that affects the interested parties. *Airline Pilots Association v. U.A.L. Corp.*, 897 F.2d 1394 (7th Cir.1990); *Wilson v. U.S. Department of Interior*, 799 F.2d 591 (9th Cir.1986). Thus, they assert that we should order the release of all the judicial documents related to the contempt hearing and the unreleased transcript pages. In their view, these documents are essential so that the public can understand what happened to Wakefield.

1. It is also noteworthy that the newspapers have changed their claims as the case has progressed. They first sought access on constitutional and common law grounds, then they sought access to protect their reporters from compelled testimony. Finally, with full knowledge that the hearings had been completed, the newspapers never sought the hearing transcripts until prompted to do so by this court. Now, with all but eleven pages of the hearing transcript, the newspapers seek the eleven pages on constitutional and common law grounds. Many of the theories presented to this court were never presented to the district court. Parties may make alternative claims, may change claims, may sometimes file inconsistent claims, but parties may not do so in the appellate court. This court reviews the case tried in the district court; it does not try ever-changing theories parties fashion during the appellate process.

[5] The newspapers do not meet the exceptions' two conditions in order for the capable of repetition, yet evading review exception to apply: (1) the challenged action must be of too short a duration to be fully litigated prior to its cessation, and (2) a reasonable expectation must exist that the same complaining party will be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975).

As an example of the action's short duration, the newspapers assert that they acted promptly by filing during the contempt proceeding's adjournment a motion for a stay pending the appeal of the district court's closure. The record refutes this assertion. The underlying case has been in the federal court system since November 29, 1982. Even prior to the 1986 closure, the Times reported on the Wakefield case, but not until 1988, did Times seek to intervene. Additionally, the newspapers did not appeal the closure order until the contempt hearing had been adjourned for a continuance. These facts refute the newspapers' assertions of the action's short duration.

Likewise, the newspapers cannot satisfy the second condition. In addressing the second condition, the newspapers argue that if this court does not offer judicial guidance, a "reasonable expectation" exists that this controversy will occur again. They specifically state that they "continue to expect and suspect that secret church proceedings are being or will be held," and suspect that the Church will bring contempt proceedings against the other plaintiffs. The record does not support these suspicions.

[6] This case involves unique circumstances which are not easily repeated. Wakefield's constant disregard and misuse of the judicial process mandated partial closure. Since Wakefield's contempt hearing concluded, the Church has not instituted nor has the district court conducted any additional contempt hearings, show cause hearings, or *in camera* proceedings. Furthermore, nothing indicates that the Church contemplates these actions. Although the newspapers' suspicions that secret church and contempt proceedings will occur constitute a theoretical possibility, a mere hypothesis or theoretical possibility is insufficient to satisfy the test stated in *Weinstein*. *Morgan v. Roberts*, 702 F.2d 945, 947 (11th Cir.1983). Thus, no "reasonable expectation" exists that this controversy will occur again.[2]

The newspapers' interest in the important constitutional issue which was once alive in this case is understandable. Nevertheless, we must wait for another case with a current controversy, and with a well-developed record to address the issue. The fact that much of the delay in this case is attributable to a busy and overburdened federal district court is unfortunate.

Because the newspapers cannot satisfy the capable of repetition, yet evading review requirements, this case is moot. Accordingly, this case is dismissed.[3]

DISMISSED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Donna EPPERSON, Defendant-Appellant.

No. 90-3344.

United States Court of Appeals, Eleventh Circuit.

Aug. 14, 1991.

Rochelle Reback, Tampa, Fla., for defendant-appellant.

2. As earlier noted, the hearings were not halted because the newspapers did not prevail on their motions for stay pending appeal. We must assume that in the proper cases stays will be granted.

3. We express no opinion on whether the remaining eleven pages of the transcripts may properly be sought in another federal lawsuit.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, CA 90028.

On June 29, 1992, I served the foregoing document described as PLAINTIFF'S NOTICE OF FILING OF FEDERAL AND NON-CALIFORNIA CASES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S DEMURRER TO THE FIRST AMENDED COMPLAINT on interested parties in this action as follows:

[ ] by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

[X] by placing [ ] the original [X] a true copy thereof in a sealed envelope addressed as follows:

Paul Morantz **BY U.S. MAIL**
P.O. Box 511
Pacific Palisades, CA 90272

Graham Berry **BY U.S. MAIL**
Lewis, D'Amato, Brisbois & Bisgaard
221 N. Figueroa St. Suite 1200
Los Angeles, CA 90012

Ford Greene **BY U.S. MAIL**
Hub Law Offices
711 Sir Francis Drake Boulevard
San Anselmo, CA 94960-1949

[x] BY MAIL

[ ] *I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[x] As follows: I am "readily familiar" with the firm's practice of collection and processing

correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on June 29, 1992 at Los Angeles, California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelopes by hand to the offices of the addressee.

Executed on ___________, at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

______________________ ______________________
Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)